95

Supreme Court, U.S.
FILED

JUN 11 2008

OFFICE OF THE CLERK
William K. Suter, Clerk

Docket No. (1) 07 1572

In The
SUPREME COURT
OF THE UNITED STATES

PINCKNEY A. WOOD
[Plaintiff/Appellant/Applicant/Petitioner]
(PRESIDENT, COALITION OF LOUISIANA
ANIMAL ADVOCATES)*

Versus

BOB DEL GIORNO, WWL AM, AND
SINCLAIR COMMUNICATIONS, INC.
[Defendants/Appellees/Respondents/Respondents]

On Petition for Writ of Certiorari to
the Louisiana 4th Circuit Court of Appeal

A PETITION FOR WRIT OF CERTIORARI

BY AND ON BEHALF OF

PINCKNEY A. WOOD
[Pro Se Plaintiff/Appellant/Applicant/Petitioner]

6001 Colbert Street
New Orleans, LA 70124
(504) 717-3895

QUESTIONS PRESENTED FOR REVIEW

Was the Louisiana 4th Circuit Court of Appeal in error in determining that the statements alleged by the Plaintiff to be *defamation per se*: "Well, every fact you've presented so far is out-and-out lying.", a factual statement but completely false as provable upon documents filed in evidence with the district court, and "This man is a fraud. He's an absolute fraud.", were "merely opinions or hyperbole, rather than facts, and are therefore not actionable as defamation"?

Was the Louisiana 4th Circuit Court of Appeal in error in simply presuming that the Defendant was a *media defendant* and thus entitled to *qualified privilege*, as required by New York Times Co. v. Sullivan and related case law, even though the Plaintiff provided evidence from the transcript of the radio program attesting that he, after having finished for the day, simply intruded onto the radio program where the Plaintiff was to present information for the listeners, and from a letter written by the station manager to the Plaintiff's wife (and other letters written by Mr. Andrews) relating that the Defendant was acting as an individual and not in his capacity as an employee of the station?

Subsidiary in these two questions lie questions pertaining to the other salient matters in cases of defamation: *actual malice, reckless disregard for the truth, limited-purpose public figure*, and *a matter of public concern*.

PARTIES TO THE CASE

Pinckney A. Wood is the Plaintiff, Appellant, Applicant, Petitioner [Plaintiff].

Regarding the caption qualifier for the Plaintiff: He was president of COLAA when this case was originated in district court. At the time of the incident upon which this case is based, he was acting-president because the president had resigned. Currently, Plaintiff/Petitioner is president of another non-profit charity: The Humane HEART (Health, Education, & Abuse Resolution Taskforce).

The Defendants, Appellees, Respondents, Respondents [Defendants] are:
Robert A. Del Giorno, the principal Defendant [Defendant];
WWL AM and Sinclair Communications, Inc., the secondary Defendants. Note: Regarding the secondary Defendants, the Defense has apprised the Court:

> WWL AM is not a legal entity. Additionally, at the same time in question, the owner of that radio station was Sinclair Radio of New Orleans, Inc. (not "Sinclair Communications, Inc."). Defendants have not chosen to make an issue of that mistaken identity. Additionally, since the lawsuit was filed, Sinclair Radio of New Orleans, Inc. has been merged into Sinclair Broadcasting Group, Inc., who voluntarily appears herein as successor to Sinclair Radio of New Orleans, Inc.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE CASE	ii
[THIS TABLE OF CONTENTS]	iii
TABLE OF CITED AUTHORITIES	v
CITATIONS OF COURT OPINIONS, Ect.	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES	3
STATEMENT OF THE CASE	4
ARGUMENT FOR ALLOWING A WRIT OF CERTIORARI	12
ELABORATING ARGUMENTS	17
CONCLUSION	40

INDEX OF APENDICES

APPENDIX I. ix

DISTRICT COURT'S JUDGMENT
AND REASONS FOR JUDGMENT

APPENDIX II. xii

OPINION OF THE LOUISIANA
4TH CIRCUIT COURT OF APPEAL

APPENDIX III. xxvii

SUPREME COURT OF LOUISIANA
NOTIFICATION OF DENIAL
OF APPLICATION FOR WRIT OF
CERTIORARI

APPENDIX IV. xxviii

VERBATUM STATEMENTS OF
CONSTITUTIONAL PROVISIONS
AND STATUTES

TABLE OF CITED AUTHORITIES

Cases: [page number format in this petition: – p#]

Louisiana state cases:

Arledge v. Hendricks, 715 So.2d 135, La. 2nd Cir., 1998 – p23

Edwards v. Derrick, 193 La. 331, 190 So. 571, La. Sup., 1939 – p18, p24

Fellman v. Dreyfous, 47 La. Ann. 907, 17 So. 422, 1895 – p23

Fourcade v. City of Gretna, 598 So. 2d 415, La. 5th Cir., 1992 – p23

Kennedy v. Item Co., 213 La. 347, 372, 34 So. 2d 886, 1948 – p23

Lawrence v. Evans, 573 So. 2d 695, Miss., 1990 – p23

Manale v. City of New Orleans Dept. of Police, 673 F. 2d 122, U.S. 5th Cir. (La.), 1982 – p23

Rosen v. Reed, 351 So. 2d 1284, App. La. 1st Cir., 1977 – p24

Sommer v. State, DOTD, 758 So. 2d 923, La. 4th Cir., 2000 – p19

U.S. federal cases:

Buckley v. Littell, 539 F. 2d 882, U.S. 2nd Cir., 1976 – p22 (twice), p32, p36

Gertz v. Robert Welch, Inc., 41 L. Ed. 2d 789, 418 U.S. 323, 94 S. Ct. 2997, U.S. S. Ct., 1974; 94 S. Ct., at 3012 – p8, p23, p26

Greenbelt Cooperative Publishing Assn., Inc. v. Bresler, (398 U.S. 6, 1970) – p28

Milkovich v. Lorain Journal, 497 U.S. 1, 110 S. Ct. Rep. 2695, 1990 – p8, p12, p26 (twice), 27 (thrice)

New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 1964 – p8, p13 (twice), p14, p26, p32 (twice), p34

Other state cases:

Blevins v. W.F. Barnes Corp., 768 So. 2d 386, Alabama Civ. App., 1999 – p24

Gordon v. Boyles, 99 P.3d 75, Colorado Ct. App., 2004 – p24

Scott v. News-Herald, 25 Ohio St.3d 243, 254, 496 N.E.2d 699, 709 (1986) – p27 (twice)

Tindall v. Konitz Contracting, Inc., 240 Mont. 345, 783 P. 2d 1376, 1989 – p22

Vinson v. Linn-Mar Community School District, 360 N.W. 2d 108, 22 Ed. Law Rep. 403, Iowa, 1984 – p22

References:

American Jurisprudence 2d, Libel and Slander (§192, page 530) – p22

American Law of Torts, Speiser, Krause, and Gans (1983), Vol. 8, Ch. 29, §52, pages 491, 544 – p19

Corpus Juris Secundum, Libel and Slander (vol. 53) – p20

Johnny Andrews (WWL AM General Manager) letter, November 14, 1997 – p6, p34 (On both pages, there is a quote from the letter which is in evidence with the court.)

Justice Antonin Scalia (about his position on *qualified privilege* for *media defendants*): <http://writ.news.findlaw.com/dean/20051202.html> – p33

CITATIONS OF COURT OPINIONS AND ORDERS

At this point, this case has only one avenue of redress still available: this petition to the USSC for Writ of Certiorari.

The Judgment of the Civil District Court of the Parish of Orleans denied Plaintiff's Motion for Summary Judgment on the matter of *defamation per se*, and granted the Defendants' Cross-motion for Summary Judgment (with no specific comments regarding the various points cited in the motion) on May 12, 2005.
[Transcriptions of the document and the accompanying Reasons for Judgment are in Appendix I.]

The Louisiana 4th Circuit Court of Appeal issued an opinion and partial dissent on December 19, 2007. It accepted the district court judgment, and further, it agreed with the contention of the Defense that the statements alleged by the Plaintiff to be defamatory had no defamatory connotation.
[The document transcription is in Appendix II.]

The Supreme Court of Louisiana denied Plaintiff's application for Writ of Certiorari on March 14, 2008. [The document transcription is in Appendix III.]

JURISDICTION

This petition seeks a Writ of Certiorari to the Louisiana 4th Circuit Court of Appeal which issued, on December 19, 2007, its adverse opinion regarding the appeal of the Plaintiff.

On January 18, 2008, the Plaintiff applied to the Supreme Court of Louisiana for a Writ of Certiorari to the Louisiana 4th Circuit Court of Appeal. Plaintiff's application was denied on April 14, 2008, the day after the Defendants filed their response.

This Court has jurisdictional authority to consider the matter of defamation and related matters that are the elements of this case, limited to the two essential questions cited above: the first a matter of *definition*, and the second a matter of Constitution *privilege*. The matters were presented in the original petition to the Civil District Court for the Parish of Orleans, and later repeated, in more developed forms, in the appeal that was considered by the Louisiana 4th Circuit Court of Appeal, and in the application seeking review by the Supreme Court of Louisiana (which was denied).

The subject matters of the two questions are directly related to the freedom of speech and the freedom of the press, and the limitations thereto, as developed through the opinions of this Court in interpreting Amendment I of the Constitution of the United States as bestowed upon it by Article III, Section 2 of the Constitution, and Title 28, Section 1257(a) of the U.S. Code.

CONSTITUTIONAL PROVISIONS AND STATUTES

Amendment I. of the Constitution of the United States

Louisiana Revised Statutes
Title 14 Sections 47, 48, and 49

[Transcriptions of the above are in Appendix IV.]

Louisiana Civil Code and Louisiana Code of Civil Procedure (CC, CCP) [Relevant parts are quoted on the page indicated]:

CC Art. 2315,	Note 1446	– p19
	Note 1455	– p19
CCP Art. 966(B)		– p20
CCP Art. 966,	Note 45	– p20

STATEMENT OF THE CASE

This is a case of defamation where the verbal exchange between the Defendant and the Plaintiff in which the defamation occurred is documented by an audio recording of the radio program on which the defamation occurred, and a transcript of that recording, both of which are in evidence in the record of the court.

While the defamatory attacks on the Plaintiff by the Defendant lasted over a significant portion of the radio program, there are two statements in particular that the Plaintiff maintains form the crux of his case, and which constitute not only ordinary defamation, but *defamation per se*. The statements were made as fact (presumed by the Defendant), and together, accentuating one another, they establish a cause of action for defamation. They are false factual statements that attack the honorable integrity of the Plaintiff, characterizing him as a dishonest person, specifically a liar and a fraud, and thus tend to injure his reputation both personally and professionally. Here are those crux statements:

"Well, every fact that you've presented so far is out-and-out lying."
(transcript page 8), and
"This man is a fraud! He's an absolute fraud!"
(transcript page 10).

The Plaintiff initiated contact with the producer of the "André Show" with André Trevigne on WWL AM radio in New Orleans to suggest a program topic: "canned-hunts" so that the public might be alerted about the proliferation of "canned-hunts" in Louisiana by the Commissioner of

Agriculture and Forestry. "Canned-hunts" are commercial enterprises wherein animals, native and/or exotic, including cast-off domestic, zoo and circus animals, are kept in high-fenced enclosures where they are fed and watered, and eventually shot with bullet or arrow by heavily paying customers who are often inexperienced at killing – resulting in great pain and prolonged suffering for the ill-fated animals. The Plaintiff was invited to be on the program on Monday, October 27, 1997.

This activity was not then, nor is it today, a matter of general public knowledge. It was clear from the mis-apprehensions about the term on the part of the Defendant, as his statements in the transcript show, that he was unfamiliar with the topic, as was André Trevigne and her producer prior to being informed about "canned hunts" by the Plaintiff.

The Defendant said on the program, "... the only reason why I came in here, I read the promo this morning on this canned hunt situation, and I thought to balance off the scales here, that the correct information should be put on the airwaves." His perception was that an "animal rights guy" was going to be on the program attacking hunting. He said (transcript page 16), "And we're debating hunting against animal rights. And, this guy's an animal rights ...", whereupon he was interrupted by André saying, "No we're not. We've debating whether or not true hunters want to go into an enclosed area to shoot animals." The Plaintiff was, and is, an animal welfare/animal protection advocate, and the organization he was representing as acting president was a state-wide humane organization where members (individuals and organizations)

represented a broad spectrum of animal-orientated concerns mainly having to do with pets and anti-cruelty matters. The organization had no policy with regard to traditional hunting, and the Plaintiff was there only to shed light, as a concerned and public spirited citizen, on a cruel perversion of hunting: "canned hunts".

The fact that the Defendant was not on the program in his professional capacity as a broadcaster is confirmed by station manager Johnny Andrews in letters that are in evidence in the court record. Mr. Andrews wrote, "Mr. Del Giorno was invited to join the discussion not in his capacity as the morning host on WWL or as a representative of the station, but as an 'outdoorsman.' He was appearing as an individual and expressing his views as a 'hunter.'"

The focus of the Defendant was addressing "animal rights activists versus hunting" and not the actual topic of the program of which he had no awareness or knowledge.

The characterization of the Plaintiff as a liar, and spreader of mis-information was hammered by the Defendant incessantly. It was not "a momentary lapse of courtesy" as the Defense has said. At one point he droned, "Wrong!", not after every sentence, but nearly every phrase (transcript page 19). At another point, after André asked the Plaintiff to state some of the facts that he brought with him, the Defendant said (transcript page 9), "Yeah, I want to hear these facts, because I'll counter with the correct information.", condemning the words of the Plaintiff even before they were spoken.

Callers-in admonished the Defendant for his attack upon the Plaintiff. The André Show was not a program where such abusive attacks were typical and expected to occur, as the Defense has incorrectly stated. André Trevigne stated only last year in reference to the program, "it was the most humiliating event of my radio career."

Toward the end of the program (transcript page 33), the Defendant finally realized he was in error. He said, "And, I oppose any game farm or whatever that traps animals and pens 'em up, and allows people to go on and shoot them." – which proves his previous lack of awareness about canned-hunts. However, he made no statement of apology regarding the Plaintiff for his abusive and defamatory remarks that had occurred during the program.

Because people don't necessarily listen to complete programs, but only segments (as substantiated by André generally reintroducing the topic of the program after each break), and because the Defendant was a person that many must have regarded as a reliable figure of authority because of his position as a "radio personality" on his own program on the same station (immediately preceding the André Show), many listeners may well have been left with the impression, conveyed to them by the Defendant, that the Plaintiff is a liar and a fraud: an untrustworthy person. This tends to be especially damaging for one engaged in charitable activities, such as the Plaintiff.

The Disposition of the Case by the District Court

Plaintiff's petition was filed October 23, 1998. On December 2, 2004, the Plaintiff submitted a Motion for Summary Judgment asking the Court to determine that the defamatory remarks of the Defendant (i.e., the crux statements cited above) constitute *defamation per se*. A hearing was set. The Defense filed a Cross-motion for Summary Judgment one week before the scheduled hearing. That motion claimed use of the word fraud was only opinion and "rhetorical hyperbole". The statement that characterized the Plaintiff as a liar was not mentioned. Their motion introduced arguments pertaining to *qualified privilege* based upon claims of *media defendant, limited-purpose public figure* plaintiff, *a matter of public concern*, and *actual malice* as addressed by the significant "media versus public figure"-related cases of: *New York Times Co. v. Sullivan, Gertz v. Robert Welch, Inc., Milkovich v. Loraine Journal Co.*, et cetera.

In a letter to the judge, the Plaintiff asked that the court reject as premature the motions of the Defense, and focus its attention on Plaintiff's motion; and to be considerate of his acting pro se because of very limited financial means.

The day before the scheduled hearing on Plaintiff's motion, the Court contacted the Plaintiff and facilitated a three-way telephone communication between him, the judge, and the attorney for the Defense. The judge asked the Plaintiff to agree to a joint hearing on the two motions at a later time and pressured the Plaintiff to accept, even though the

Plaintiff objected. The joint hearing was set for March 18, 2005. The Plaintiff submitted three motions. On March 11th, the Plaintiff submitted: "Memorandum on Various Points Pertinent to the Motions for Summary Judgment ..." (8 pages). And on March 14th, the Plaintiff submitted: "Amendment to Motion for Summary Judgment, and Requirement of Law Necessitating Postponement of Hearing on Defendant's Cross Motion" (3 pages), and "Memorandum Pertaining to Why the Court Should: i. Accept Plaintiff's Amendment to His Motion for Summary Judgment, ii. Hold the Scheduled Hearing on the Matter on the Designated Date, and iii. Postpone Hearing the Defendants' Cross Motion" (4 pages), which included Plaintiff's informing the Court that proper discovery had not been had, and that his attempts to make discovery were thwarted. The hearing was held as scheduled.

At the hearing, the Court took up Plaintiff's motion for Summary Judgment, but paused the proceeding when the Plaintiff suggested that the Court should listen to the recording of the program before deciding the matter of *defamation per se*. The judge also asked the Plaintiff to fax him case citation that the Plaintiff mentioned. The hearing was ended without addressing Defense's Cross-motion for Summary Judgment.

No hearing on Defense's cross-motion ever occurred. Consequently, the Plaintiff was never afforded an opportunity to address Defense's cross-motion in a hearing for the purpose. The Court's Judgment was in favor of the Defendants. The reason given was:

> The Court finds that the statement made by Bob Del Giorno that Plaintiff is "an absolute fraud" is not in the context of accusing Plaintiff of a crime. The comment does not arise to the level of defamation per se. Therefore, the Court GRANTS Defendant's Motion for Summary Judgment."

The Plaintiff moved for nullification and reconsideration of the Judgment of the Court on the grounds that no proper hearing was had in which Plaintiff had an opportunity to respond to Defendants' motion, but his motion was denied. Plaintiff Appealed.

The Disposition of the Case by the Court of Appeal

The Plaintiff submitted a motion for reinstatement of oral argument. He was unaware of the rule whereby the appellant may opt for oral argument within 14 days following the lodging of his case with the court of appeal. The court denied his motion.

The opinion for the Court of Appeal aligns completely with the contentions of the Defense; focusing on the word "fraud" as the key element of the remarks that the Plaintiff maintains are defamatory, and repeating the claim of the Defense that, in context, the word expresses the opinion of the Defendant and was "rhetorical hyperbole". Consequently, the Court of Appeal affirmed the Judgment of the District Court, and stated explicitly not only that *defamation per se* did not apply, as did the District Court, but also, in exceeding the explicit Reasons for Judgment of the District Court, that the

remarks of the Defendant, that the Plaintiff maintains are defamatory, did not constitute defamation.

Further, in the Opinion for the Court of Appeal, the Defendant was presumed to be a *media defendant*, despite the evidence to the contrary; and the contention of the Defense that the Plaintiff was a *limited-purpose public figure* on *a matter of public concern* was accepted.

One of the three Court of Appeal judges on the panel reviewing this case dissented in part. He opined that summary judgment was precluded regarding Defense's Cross-motion for Summary Judgment because the Court had to "determine the intent of a party." He adamantly asked, "If intent is not fact based, what is?" And then elaborated: "Further, intent is so fact intensive that it clearly lends itself to a determination that genuine issues of material fact preclude the granting of summary judgment in this matter."

Disposition by the Supreme Court of Louisiana

Plaintiff's application to the Supreme Court of Louisiana for a Writ of Certiorari was denied on March 14, 2008, the day after the response from the Defense was filed.

ARGUMENT FOR ALLOWING A WRIT OF CERTIORARI

The Plaintiff holds that defamation law as it has been shaped and developed by this Court clearly indicates that the statements that he claims are *defamation per se* would have to be recognized as such by this Court. The statements being: "Well, every fact you've presented so far is out-and-out lying." and, "This man is a fraud. He's an absolute fraud!"

However, the courts of Louisiana have not perceived it. If the aspects of defamation law are so confused, through a myriad of case law that has not always been consistent, and where the valid implications have changed over time leaving some case law out-dated; then perhaps this court should once again act to clarify defamation law as Chief Justice Rhenquist did in his opinion for the court in *Milkovich v. Loraine Journal Co.*

There are two important special issues in this case as pointed out in the Questions for Review.

One is the discerning of whether an alleged defamatory statement is fact or opinion, or of whether an alleged defamatory statement is simply an exaggerated use of a "fighting word" (e.g., traitor) that might ordinarily be defamatory if completely false, but which conveys a legitimate level of underlying truth in a broader, attenuated use of the word. This has been adequately addressed by this Court for those who take time to comprehensively

review the evolution of the relevant decisions of the Court. However, the descriptive term that has come to be used: "hyperbole" (a term not commonly found in dictionaries of legal terms) has caused more confusion. Please see discussion in **Elaborated Arguments** below.

The other is the discerning of when a person is entitled to the status of *media defendant*, a status which places additional burdens on the plaintiff trying to establish his defamation case.

Even the experienced and respected attorney for the Defendants showed some lack of polish here and there. Regarding whether or not the Defendant has qualified privilege as a *media defendant*, He said: "... plaintiff has raised an interesting analytical issue and entered a debate which incredibly, is still ongoing more than forty years after *New York Times v. Sullivan, supra.* was decided regarding the proper foundation for this constitutional privilege. That is, does the status of the defendants as journalists matter? Although the United States Supreme Court has not only declined to provide more clarity (and worse, has given "mixed" signals on the subject), the short answer is that, since the First Amendment protects both free *speech* and a free *press*, the *New York Times* standard applies to non-media defendants. See Bussie v Larson, 501 F. Supp. 1107 (M.D. La. 1980) and Wattigny v. Lambert, 453 So.2d 1272 (La. App. 3rd Cir. 1984), writ denied, 512 So.2d 1182 (La. 1987). That is, as suggested by various scholars, the core question is whether the speech involves a matter of public concern. ..."

Plaintiff's reading of the development of defamation law, a process that has not always been on a steady course, leads him to conclude that all of the cases in the *New York Times Co. v. Sullivan* vein have involved media defendants, and consequently apply to media defendants. It is on the plaintiff-side where the issue of who the person is arises. Is he a public official, a public figure, a limited-purpose public figure? In each case, the plaintiff may have to bear the burden of showing *actual malice* on the part of the defendant. Even in cases of private-individual plaintiffs the court has set certain barriers. The plaintiff must show falsity as a precursor to any presumed or punitive damages, or the plaintiff, where the defamation is associated with a *matter of public concern,* must show that the false connotations were made with some level of fault.

In this case, the court of appeal gives little attention to whether the Defendant was a *media defendant* as claimed by the defense, but it readily presumes it. The Plaintiff indicated two items in evidence that prove the Defendant, a media personality, was not entitled to *qualified privilege* as a *media defendant.* His own words in the transcript of the program attest that he, after having finished for the day, simply intruded onto the radio program where the Plaintiff was to present information for the listeners. And, letters written by the station manager, to the Plaintiff's wife and others, that the Defendant was acting as an individual and not in his capacity as an employee of the station. (These points are raised in detail in the Statement of the Case above.) With hard evidence to the contrary, the

courts were amiss in presuming the Defendant to be a *media defendant.*

This case can afford this Court an opportunity to better delineate *qualified privilege* as a *media defendant.* It may well be that just because one qualifies as press should not automatically grant him *qualified privilege.* Amendment I exists to assure that individuals may speak freely, especially when the speech is critical of government, with the understanding that the speaker must be responsible in not speaking treason or other speech that would be categorized as criminal. With regard to defamation, considerable latitude has been allowed for speech with no malicious intent that may encroach significantly on a person's right to defend his good name, but which is granted in recognition of the right of others to express themselves frankly and freely. But, perhaps the right of a person to defend his good name has been too carelessly and undeservedly seconded to those rights of others.

It may well be that courts find they are unable to put forth the time and diligence necessary to justly address a case of defamation in light of all its complexities, and consequently resort to their "gut" or some other way of "dismissing" the matter (rather than justly resolving it). If so, and there is good reason to think it, it has been to the detriment of the plaintiff. This Court may want to set better guidance so that the real meaning the Court intends to have conveyed, which will be applied by all courts, is not obscured by too-easily-misconstrued meanings of fundamental terms.

In this case, the efforts of the plaintiff to communicate with his community on a matter of significant importance was foiled by a presumptuous, unknowledgeable individual steeped in pomposity. There was no coherent discussion on the topic the plaintiff had come to address: canned-hunts. The Defendant was fixated upon the notion that the plaintiff was an "animal rights guy" about to denigrate hunting. The remarks of the Defendant that precipitated this case were motivated by his utter prejudicial contempt for the plaintiff, which was evident. Even if the subject of canned-hunts had been a "matter of significant public concern", the Defendant's remarks were not actually in the context of a coherent discussion on the topic. Here also is fertile ground for this court to better delineate fundamental terms.

It is relatively easy for an individual to enter the public domain as a participant in the shaping of public opinion or in the influencing of government. Recall the famous Norman Rockwell painting depicting a man simply clothed wearing a leather jacket and standing to speak in a community meeting. Such is an element of what is good about our system of public participation.

The term "chilling effect" has been used to bolster *qualified privilege* for agents of the press. But, what about the "chilling effect" of too-free attacks upon the dignity of the individual who would enter the public domain as a participant? It is for this Court to set a fair balance, and to communicate it in a way that is readily understood.

ELABORATING ARGUMENTS

The following is included to give a more in-depth treatment of the matters of this case that includes citations of supporting law.

On The Matter Of Defamatory Statements Made With *Actual Malice*

In his Motion for Summary Judgment, the Plaintiff asked the court to render summary judgment in his favor on the matter of defamation as a first phase in the court proceedings in the case. The court could then move to the second phase to determine damages. The Plaintiff maintained that there was *defamation per se* and *reckless disregard for the truth*, which indicates *actual malice* on the part of the Defendant.

Plaintiff's motion for Summary Judgment was appropriate because it merely asked for a determination of *defamation per se*, an action requiring no evidence other then: the requirements of the court in establishing *defamation per se* (i.e., definition of the term), the defamatory words themselves (which are in the transcribed recording of the program), the facts presented by the Plaintiff referenced in the defamatory factual statement: "Well, every fact you've presented so far is out-and-out lying." (which are also in the transcript), and the documents in evidence provided to the court by the Plaintiff (much of which the Plaintiff had with him on the program, and attempted to share with the

Defendant during a break) that verify the facts presented by the Plaintiff, and thus show the defamatory statements of the Defendant to be false. These, taken together, establish that there is *no genuine issue as to material fact* regarding *defamation per se*, and consequently, summary judgment in favor of the Plaintiff on that basis is appropriate.

The various statements of the Defendant that impute dishonesty to the Plaintiff have no basis, being contrary to the truth.

The statements of the Defendant: "Well, everything you've said so far is out-and-out lying." and "This man is a fraud. He's an absolute fraud!" certainly convey the untrue imputation that the Plaintiff is an intentionally dishonest person. This is sufficient for a finding of *defamation per se*. (*Edwards v. Derrick*, Sup. 1939, 193 La. 331, 190 So. 571) Also, the Plaintiff was representing a non-profit charity: the Coalition of Louisiana Animal Advocates, sustained by membership and donations of time and money. The word "fraud" in reference to the representative of a charitable organization may have been taken as an imputation of criminality by some listeners. Under R.S. 51:1905(A), literally and liberally interpreted, it would be a crime for a representative of a charity to engage in misrepresentation. Surely, it was a defamatory remark that tended to injure the Plaintiff in his occupation as a humane advocate, and in that regard alone constitutes *defamation per se*. ("Words that ... tend to injure one's personal or professional reputation

are considered defamatory per se." - *Sommer v. State*, DOTD, 758 So. 2d 923, La. 4th Cir., 2000)

American jurisprudence regards statements that tend to demean a person in their business as *defamation per se*. The American Law of Torts by Speiser, Krause, and Gans, c. 1983, Vol. 8, p.544, states "one who publishes a slander that ascribes to another conduct, characteristics of a condition that would adversely affect his fitness for the proper conduct of his lawful business, trade or profession, or of his public or private office, whether honorary or for profit, is subject to liability without proof of special harm."

The Plaintiff was representing a non-profit charity, the Coalition of Louisiana Animal Advocates (a coalition of humane organization representatives and individuals), as its acting-president at the time of the alleged defamation. The business of animal protection was and is a foremost endeavor of the Plaintiff as it has been for more than 25 years. When the Defendant made his defamatory remarks about the Plaintiff, he was not only disparaging him in his person, but also as one whose business in animal welfare, which he was representing on the program, includes providing true and reliable information. Surely, characterizing a person as a fraud and a liar would be detrimental to that person in any endeavor. The Plaintiff also has had a career over the years as a teacher of science and mathematics. Naturally, the general defamatory remarks of the Defendant characterizing the Plaintiff as a fraud and a liar tend to harm him in that field as well.

Yet, the Opinion for the Court of Appeal holds that the Defendant's remarks that the Plaintiff is a fraud and a liar cannot be understood to convey to the average listener that the Plaintiff is a person lacking in moral character or untruthful in his business practices. But in reality, don't the words "fraud" and "liar" necessarily imply lack of moral character and untruthfulness? And, as an officer in a humane charity, it was a "business practice" of the Plaintiff to represent humane concerns as he was doing on the program where his honesty was impugned by the Defendant.

Various courts have addressed the issue of *defamation per se*, and have by their decisions sketched the meaning of the term. The Corpus Juris Secundum includes in vol. 53, Libel and Slander, page 38 et seq.: "A statement libelous per se [which equates to defamation per se in Louisiana] has a natural tendency to provoke the plaintiff to wrath or expose him or her to public hatred, contempt, or ridicule, or to deprive him or her of the benefit of public confidence or social intercourse. [Surely the defamatory remarks of the Defendant were such as that.] Consideration of extrinsic facts and surrounding circumstances is not necessary."

The Opinion for the Court of Appeal held that it was "unlikely" that the remarks of the Defendant would have the effect of, among other things, exposing the Plaintiff to contempt or ridicule. "The remarks," the Opinion held, "were not intended to be taken literally as statements of fact." This must be the "intent" that Judge Jones referred to in his dissenting opinion. But the evidence of the

transcribed recording of the program shows that the Defendant did try to make the Plaintiff an object of contempt, at least in the estimation of hunters, by making remarks that portrayed the Plaintiff as an "animal rights" enemy of hunting. The evidence of the transcript also shows that the Defendant ridiculed the Plaintiff. Therefore, the observation in the Opinion for the Court of Appeal cannot be substantiated. Yet it was used as a basis for declaring that no defamatory words were spoken. Further, in using the word "unlikely" it leaves open the possibility that reasonable people could interpret otherwise whether the Plaintiff was exposed to contempt and/or ridicule, and whether it was actually the intent of the Defendant to have his statements taken literally as statements of fact. This opening for opposite interpretations of matters of material fact disallows by law summary judgment in favor of the Defendants by declaring, as did the Opinion for the Court of Appeal, that there were no defamatory words. To the Plaintiff, it is clear from the deadly serious and contemptuous attitude of the Defendant, as is evident in the recording of the program, that the Defendant meant every word he said to be believed as fact by the listeners.

The Plaintiff was demeaned, insulted, and defamed throughout a large part of the program (on pages 3, 4, 6, 7, 8, 9, 10, 14, 17, 19, and 32 of the 35-page transcript). Compounding the defamatory words already cited, the Defendant said the Plaintiff was a spreader of mis-information, and cast other incidental insults (e.g., "You're a mess.", "You're an idiot!") that exacerbate the defamation in accord

with the C.J.S. definition above. The "idiot" remark was particularly reprehensible.

C.J.S., vol. 53, pages 88-91 include: §45 Written or printed words which impeach a person's reputation for honesty or integrity, or charge dishonesty or fraud, will, of themselves, support an action for libel. (*Buckley v. Littell*, 539 F. 2d 882, U.S. 2nd Cir., 1976) It is libelous per se to charge a person with knowingly making false representations with intent to deceive another, ... And, §46: Written charges imputing falsehood in direct form, or implying want of veracity, are libelous per se, (*Buckley v. Littell*) as where a person is charged in writing with being a liar. [In Louisiana law, there is no distinction between libel and slander. Both are regarded as a single quasi-offense: defamation.]

The publication: American Jurisprudence 2d, states in Libel and Slander, §192, page 530: "An attack on the integrity and moral character of a party is libelous per se – that is, actionable without proof of malice, falsity, or damage. (*Vinson v. Linn-Mar Community School District*, 360 N.W. 2d 108, 22 Ed. Law Rep. 403, Iowa, 1984) Thus, words that impute dishonesty or corruption are libelous per se." (*Tindall v. Konitz Contracting, Inc.*, 240 Mont. 345, 783 P. 2d 1376, 1989)

All taken together, a finding of *defamation per se* is indicated. The statement: "Well, every fact you've presented so far is out-and-out lying." characterizes the Plaintiff as a liar, and as such is defamatory on its face. A single accusation of being a liar has been

held actionable. (*Lawrence v. Evans*, 573 So. 2d 695, Miss., 1990)

Defamation per se implies falsity, malice (*Fourcade v. City of Gretna*, 598 So. 2d 415, La. 5th Circuit, 1992), and injury. (*Arledge v. Hendricks*, 715 So. 2d 135, La. 2nd Cir., 1998). "Under Louisiana Law, *defamation per se* statements are those having tendency to deprive person of benefit of public confidence or to injure him in his occupation or reputation." (*Manale v. City of New Orleans, Dept. of Police*, 673 F. 2d 122, 1982).

Injury to one's reputation is a consequence of defamation. In Louisiana, and elsewhere, damage to reputation is regarded as *actual damage*, supplanting any requirement to prove special damages. (*Kennedy v. Item Co.*, 34 So. 2d 886, 895, La. Sup. Ct., 1948); *Fellman v. Dreyfous*, 47 La. Ann. 907, 17 So 422, 1895)).

> "(A)ctual injury is not limited to out of pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, ... all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury." (*Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997 at 3012, 1974, 41 L. Ed. 2d 789)

"In case of libel, if the language used exposes the plaintiff to public ridicule or contempt, though it does not embody an accusation of crime, the law presumes damage to the reputation, and pronounces it actionable per se." (*Blevins v. W.F. Barnes Corp.*, 768 So. 2d 386, Alabama Civ. App., 1999) And, "To be 'defamation per se', that is, to be actionable without proof of special damages, a libelous statement must be (1) on its face and without extrinsic proof, unmistakably recognized as injurious by having a defamatory meaning and (2) specifically directed at the plaintiff." (*Gordon v. Boyles*, 99 P.3d 75, Colorado Ct. App., 2004)

"In order not to be libelous, comment must be fair and free of malice." – Note 3 under R.S. 14:49 in Louisiana Revised Statutes Anotated.

CC Art. 2315, note 1446: "If words are libelous or slanderous per se, the law presumes or infers malice, and the absence of actual malice will not bar recovery."

CC Art. 2315, note 1455: "To accuse a person of an act of dishonesty is injurious per se, and if the accusation is false it implies the kind of malice which consists of a wanton negligent disregard of the rights of others." (*Edwards v. Derrick*, 193 La. 331, 190 So. 571, 1939; *Rosen v. Reed*, App. 1 Cir., 1977, 351 So. 2d 1284)

There is *no genuine issue of material fact* concerning the defamatory words themselves: "fraud", "absolute fraud", and "every fact that you've presented so far is out-and-out lying". Those words

are defamatory on their face and in themselves (i.e., *per se*) without regard to interpretation; and they are injurious to the Plaintiff both personally and in his occupation, thus constituting *defamation per se.* They were spoken as factual descriptions of the Plaintiff's character, and they were spoken with utter seriousness and with a contemptuous and venomous tone as may be heard on the tape recording of the program. Also, incidentally, they were spoken with *reckless disregard as to whether they were true or not*, which constitutes *actual malice.* (There is additional argument regarding *actual malice* below.)

CCP Art. 966(B), governing Summary Judgment, states that the "judgment sought **shall** be rendered forthwith" if the record shows "that there is *no genuine issue as to material fact*, and that mover is entitled to judgment as a matter of law."

CCP Art. 966, Note 45: "A genuine issue of fact, for summary judgment purposes, is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, there is no need for trial on that issue and summary judgment is appropriate."

Plaintiff's Motion for Summary Judgment asked the District Court and the Court of Appeal to dispose of the fact of defamation as *defamation per se.* If the facts establish *defamation per se*, then those courts were obliged to render judgment in favor of the Plaintiff; but they did not.

On The Matters Of Opinion, "Rhetorical Hyperbole", And *Actual Malice*

The Defense maintains that the Defendant's characterizing the Plaintiff as an "absolute fraud" was simply an exaggerated opinion, and the Opinion for the Court of Appeal was in agreement. However, his tone was not that of exaggeration, and his characterization of the Plaintiff as a liar: "Well, every fact you've presented so far is out-and-out lying.", was issued as a statement of fact (i.e., the completely false factual statement that the Plaintiff was lying in all that he was presenting). This reflects on the use of the word "fraud" as also being a statement of fact, presumed and asserted by the Defendant. Consequently, these are not statements of opinion.

The case cited by the Defense, *Milkovich v. Lorain Journal Co.* (497 US 1, 110 S. Ct. Rep. 2695, 1990), contrary to their contention that it broadens a defendant's claim of opinion, actually curtails it. Reference: U.S. Supreme Court Chief Justice William Rehnquist's opinion for the court in the 7-2, 1990 decision. It covers the evolution of defamation actions relative to *media defendants* since the 1964 case that some say turned defamation law on its head: *New York Times Co. v. Sullivan.* It restates the basis of defamation law as the imperative to afford a defamed person recourse in protection of his reputation. It was an important first step in returning sensibility and true balance to defamation law.

In his majority opinion for the court in *Milkovich v. Lorain Journal Co.*, 497 US 1 (1990), Chief Justice William Rehnquist wrote that the court's opinion in *Gertz v. Robert Welsh* (1974) was not "intended to create a wholesale defamation exemption for anything that might be labeled 'opinion'" since "expressions of 'opinion' may often imply an assertion of objective fact."

The opinion for the court also included the following quotation from *Scott v. News-Herald,* 25 Ohio St.3d 243, 254, 496 N.E.2d 699, 709 (1986), a case based essentially upon the same circumstances as *Milkovich*: "Unlike a subjective assertion, the averred defamatory language is an articulation of an objectively verifiable event." The implication in a newspaper column, initially regarded as "opinion" by the courts, was that Milkovich, a coach, and Scott, a superintendent of schools, had lied at a hearing. The third time the case came before the Supreme Court of the United States (USSC), the court finally decided to review *Milkovich* for the purpose of resolving the matter of the perception in the Ohio courts that there was a constitutionally-required "opinion" exception. In *Milkovich* and in *Scott* whether the men had actually lied was verifiable based upon the evidence of the event in question and the transcript of the hearing. The quotation above also expresses the conclusion of the USSC, namely that an allegedly defamatory statement can't be simply dismissed as "opinion" where it is objectively verifiable.

In this case, the Defense essentially declared that actual statements of fact are statements of opinion,

and the Opinion for the Court of Appeal aligns with that erroneous declaration. But the falsity of the defamatory factual statement "Well, every fact you've presented so far is out-and-out lying." is objectively verifiable based upon the transcript of the program and the objective corroborative information, in the form of congressional testimony, government documents, and newspaper and periodical publications, provided to the court by the Plaintiff and which is in the court record.

The Opinion for the Court of Appeal willingly appropriates from the Defense the claim that the defamatory statements of the Defendant were "rhetorical hyperbole". The term has been used in defamation cases in ways that depart from the actual meaning of the term. However it is usage-defined in some case law. In *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler,* (398 U.S. 6, 1970) the term is taken to mean "a vigorous epithet". Currently, Merriam-Webster's Dictionary of Law includes neither the term nor the word "hyperbole".

The Defense cited examples. In the case just cited, a person was referred to as a "blackmailer" where the word "blackmailer" was used in a non-literal way to indicate that the defendant used coercive leverage to win a contract from government, and actually the use of the word was appropriately descriptive. Therefore, though not strictly correct, the term "blackmailer" conveyed an essential truth and was not maliciously used. In another case, a worker went against his brother workers who were unionized. He was referred to as a traitor. Here again, the use was non-literal, and the context

reveals there was no intention to infer that the man was a traitor to his country, but simply that he went against his brother workers. There is an element of truth in the use of the term here as well. Such terms do convey meaning, even though it may not be the exact literal meaning of the term. A court could find the intended meaning defamatory, or not, depending on the particular circumstances of the case.

However, in this case, the statement: "Well, every fact you've presented so far is out-and-out lying." conveys a literal meaning that the Defendant intended the listeners to believe. Also, there is no element of truth in the Defendant's remark.

With regard to the statement: "This man is a fraud. He is an absolute fraud!", it would have been clear to listeners that the Defendant intended to accentuate his contention that the Plaintiff was intentionally trying to mislead with lies to succeed in the disparagement of hunting and hunters which the Defendant presumed as the goal of the Plaintiff, but which had no basis in truth.

What the Defendant was conveying with those statements was again precisely the contention that he wanted the listeners to believe.

CC Art. 1953 includes the following definition of "fraud": "Fraud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other." Definitions of "fraud" generally include deceit or trickery without any necessary element of actual

criminality. The Defendant was in fact characterizing the Plaintiff as one engaged in lies and deceit in order to mis-lead. Therefore, use of the word "fraud", especially in conjunction with the statement that the Plaintiff was lying in every fact he presented, conveys an actual defamatory meaning. Such was apparent to the listeners as evidenced by the reactions of callers-in: the transcript (pages 20-23) where Philip castigates the Defendant for his abusive treatment of the Plaintiff. It's apparent that Philip did not regard the Defendant's defamatory remarks as *hyperbole.*

The word "Hyperbole" derives from the Greek, meaning to overshoot. It's literary interpretation is fanciful exaggeration, and it is ordinarily couched in an atmosphere of levity or expected humor, not in an atmosphere of deadly contempt, as on the part of the Defendant. For example, when Samuel Clemens writes "There did not seem to be brains enough in the entire nursery, so to speak, to bait a fishhook with.", or when Carl Sandberg writes "It's a slow burg—I spent a couple of weeks there one day.", that's hyperbole (fanciful exaggeration). It is not literally true, although it conveys through humor an essential perception. When the Defendant says in contemptuous seriousness that the Plaintiff is "an absolute fraud", it is absolutely not *hyperbole.* His intent was not to be humorous; it was to maliciously discredit the Plaintiff. But his claim of *hyperbole* through the Defense would indicate that he realized that the word "fraud" was not accurate; that it did not convey the truth; but he used it anyway, allowing the listeners to perceive it as they would, with no qualification, humorous or otherwise, from

him. Therefore, by implication one can conclude that when he claims *hyperbole*, the Defendant knew (or should have known) his defamatory remark was not the truth, and there is ground to conclude that his remark embodied *actual malice*.

Actual malice exists when a defamatory statement is published with knowledge that it is not the truth, or with a high degree of awareness that it is not the truth (i.e., with *reckless disregard for the truth*). It is certainly apparent from the transcript that the Defendant was deliberately attacking the Plaintiff with presumptuous remarks intended to convey dishonesty; and that his presumptions had no reasonable basis. The defendant was utterly careless in his unfounded defamatory remarks, and thus may be regarded as having a *reckless disregard for the truth*, in addition to knowledge, as his claim of *hyperbole* indicates, that his defamatory remarks were not true.

It is reasonable for the court to conclude that there were listeners who took the words of the Defendant on their face, and in consideration of the Defendant being viewed by at least some listeners who were familiar with him and perceived him as authoritative, as grounds to believe that the Plaintiff is a person wanting of moral character in that he is a liar and an "absolute fraud". The word fraud can and often does, as it may have to some listeners, convey actual criminal intent to misrepresent for the purpose of personal gain. It must have conveyed a degree of defamation even in the most liberal perception of the word.

Also, because the defamation occurred on a radio program where listeners come and go, it may be that a lot of listeners heard only enough to allow them to conclude the worst.

Hyperbole is the claim of the Defense, well after the incident. However, the perception of the listeners could not have been anything other than thinking the Defendant's remarks were real accusations delivered by the Defendant as statements of fact. It is that perception, that of the listeners to whom the defamatory remarks were broadcast, that matters.

On The Matter Of *Qualified Privilege*

The Defense admits that the Defendant "resorted to an ad hominem attack" on the Plaintiff, but incorrectly qualified it as a "momentary lapse of courtesy" and that it was "nothing more than rhetorical hyperbole." . But actually, the attack was unrelenting and occurred over a significant duration. The word "momentary" is blatantly inapplicable. As the term ad hominem indicates, the Defendant's attack was very personal, prejudicial, and directed to the Plaintiff's character apart from any intellectual consideration (*Buckley v. Littell*, 539 F. 2d 882, U.S. 2nd Cir., 1976).

In their Cross-Motion for Summary Judgment, the Defense alleged that the Plaintiff has no cause of action because of the U.S. Supreme Court decisions in the seminal *New York Times Co. v. Sullivan* case (376 U.S. 254, 84 S. Ct. 710, 1964) and its descendent cases that afford special protection to professional publishers of information in the course

of their business, and references *media defendant* and *public figure* as applying to the Defendants and Plaintiff, respectively.

The 1964 U.S. Supreme Court decision in *New York Times Co. v. Sullivan* shook American jurisprudence regarding defamation. The opinion was that a *public official* should have to withstand a certain degree of false and unintentionally defamatory comment in the press as long as it was made in "good faith"; and not with *actual malice*: knowledge of falsity or with reckless disregard as to the truth-value of the comment. The reasoning was that the media ought not be suppressed in its free expression by the "chilling effect" of possible self-censorship simply to avoid being litigated against for marginal and unintentional defamatory comments. Subsequent cases shifted the balance further by extending the boundary to include *public figures*, and then *limited-purpose public figures*, being persons identified with *a matter of significant public concern*. Media litigants tried unsuccessfully to broaden the scope universally by including private persons.

Plaintiff has read (c. 2005) that one of the honorable justices of this court, Justice Antonin Scalia, appears ready to re-address the recognition of "special license" in the form of *qualified privilege* for *media defendants*. And as mentioned above, a better delineation of when such "special license" should be warranted may be in order.

Plaintiff maintains, based upon the facts of this case and the meaning of the terms *media defendant*

and *public figure*, as may be derived from case law, that neither label is applicable. But, at the very least, they are matters that are disputable at trial and definitely not matters, for which there is *no genuine issue of material fact*, as is required as a basis to support a motion for summary judgment. The Defense has merely presumed the labels and offers no proof of either claim. A person is not a *media defendant* simply because that person is a media entity. And, the characterization of the Plaintiff as a *public figure* is only legally significant in cases involving *media defendants*.

As a matter of fact, the Defendant in this case is not a *media defendant*, as may be ascertained from the existing evidence, and therefore, none of that particular body of case law (i.e., *New York Times Co. v. Sullivan*, etc.) applies.

Plaintiff points to:

1. the transcript of the program (page 21) where the Defendant mentions how he came to be on the program ("... the only reason why I came in here, I read the promo this morning on this canned hunt situation, and I thought that to balance off the scale here, that the correct information should be put on the airwaves." – indicating that he barged in on a program that was already set, where the Plaintiff was the only previously invited guest, and

2. the letter responding to the wife of the Plaintiff, Gayle Wood, from Station Manager Johnny Andrews, which is in evidence in the court record, where he says: "Mr. Del Giorno was invited to join

the discussion not in his capacity as the morning host on WWL or as a representative of the station, but as an 'outdoorsman.' He was appearing as an individual and expressing his views as a 'hunter.'"

The Defendant was on his own, and not acting on behalf of the station. Consequently, he cannot be regarded as a *media defendant*. The claim by the Defense that he is a *media defendant* is shown to be erroneous by the evidence. Therefore, the *no genuine issue of material fact* requirement to support a motion for summary judgment cannot be substantiated. Further, since there is *no genuine issue of material fact* in regard to the Defendant as a private person (not a *media defendant*); summary judgment in favor of the Defendant because of *qualified privilege* on the basis of *media defendant* is precluded. However, the Opinion for the Court of Appeal makes the presumption that the Defendant was a *media defendant* and then virtually ignores the issue.

If the Defendant is not a *media defendant*, then whether the Plaintiff is a *public figure* is of no consequence.

But additionally, Plaintiff asserts that he cannot be regarded as a *public figure*. In "Plaintiff's Response to Defendants' Alleged "Facts Not in Dispute ...", the Plaintiff gives extensive refutation of the inaccurate claims of the Defense, including their claims that he was a *public figure* and that the defamatory remarks occurred in relation to *a matter of public concern*.

It seems that courts have accommodated defenses that have sought to erode the cause of action of defamed persons by trying to cast as a "special-purpose" *public figure* anyone who was defamed through a response to a public statement. They would have the courts regard as a *public figure* any public-spirited person exercising what he feels is his duty as a citizen.

Public figures have special public notoriety and influence (*Buckley v. Littell*, 539 F. 2d 882, U.S. 2nd Cir., 1976) that the Plaintiff did not have. At the time of the broadcast, the plaintiff was simply the person the show's host, Andre Trevigne, introduced at the beginning of the program as representing the Coalition of Louisiana Animal Advocates (a non-profit charity). A *public figure* is one who is recognized by at least a significant portion of the public, and has ready access to the media whereby he may defend himself subsequent to remarks that compromise his reputation. The Plaintiff wasn't at the time, and still isn't, generally recognizable by the public. The Defendant referred to him as an "animal rights guy" (transcript page 17). He also remarked that he had no idea who the Plaintiff was (transcript page 4 – "I have no idea who he is ..."). So at least to the Defendant, the Plaintiff was not a *public figure.*

It might be thought that the Plaintiff might be regarded as a *limited-purpose public figure* because he stepped-up to speak on a matter alleged by the Defense to be a *matter of public concern.* But, Plaintiff points to three qualifiers that dispel this: 1.) the actual topic of the program, canned-hunts, was not, in this region, a matter of significant public

concern at the time, 2.) the Plaintiff was not generally regarded in the community as being associated with the matter so as to be identified with it by the media (the Defendant himself was completely unfamiliar with the Plaintiff), and 3.) as for the Defendant, he was simply confused about what the program was about and had no definite focus on the matter of canned-hunts, and consequently, that matter cannot be regarded as a common topic of discussion.

Plaintiff maintains that the topic of the program was not at that time a matter of general public concern among people in the region of the broadcast – he was trying to make it one. But, the Defendant wrongly thought the topic of the program was "animal rights against hunting" as he says in the transcript (page 22). Although he gives lip-service protestation at other points, it was clear that his actual topic was as stated here. His defamatory statements emanated from that mistaken, emotion-driven point-of-view. However, the Plaintiff was addressing the actual topic of the program: canned-hunts. The Plaintiff was not addressing the Defendant's perceived topic. Therefore he cannot be regarded as a *limited-purpose public figure* by the court on the topic the Defendant was fixated upon. Generally, to this day very few people in the general public (even people who are interested in animal issues) know what a "canned-hunt" is. When the Defendant began to realize what a canned-hunt was, he said, "... if there was an operation like that, I wouldn't be in favor of that as a sportsman, my God!" (transcript page 12), but he still didn't appreciate it fully.

From the transcript beginning on page 16:
[Defendant:] ... if this gentleman thinks that I would approve of hunting any kind of an animal on an enclosed area ...
[André Trevigne:] Now you see, that is the issue we're talking about in here today. ...
[Defendant:] And we're debating hunting against animal rights. And this guy's an animal rights (statement interrupted)
[André Trevigne:] No we're not. We're debating whether or not true hunters want to go into an enclosed area to shoot animals.

At another point he said, "I don't know of any sportsman that would do this." (transcript page 26) Toward the end of the program, he said, "And, I oppose any game farm or whatever that traps animals and pens 'em up, and allows people to go on and shoot them. I oppose it!" (transcript page 33)

If the Defendant, a self-proclaimed hunter and sportsman who hosted a high-profile radio program of his own did not know what a "canned-hunt" (the topic of the program) was, surely it could hardly have been considered *a matter of public concern.* At least to him, at that time, it was not. Nor was it to the public, because the public wasn't aware of it, and consequently was not concerned about it.

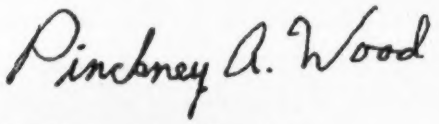
The key contention that the Defendant was not a *media defendant* was brought to the attention of the District Court in Plaintiff's "Memorandum on Various Points ...", which was filed prior to the March 18th hearing. Therefore, the court should not have regarded the matter as raising *no genuine*

issue of material fact, and consequently, the court should not have granted Defendants' motion for summary judgment. And, of course, neither should the Opinion for the Court of Appeal have affirmed it.

CONCLUSION

The Petitioner prays that this Court recognize the cogency of the arguments he has raised in support of the two matters embodied in the Questions Presented For Review; and that the Court will accordingly affirm those two matters in favor of the Petitioner, and remand the case back to the Louisiana 4th Circuit Court for further resolution consistent with the findings of this Court.

Respectfully Submitted:



Pinckney A. Wood
[Pro Se Petitioner]
6001 Colbert Street
New Orleans, LA 70124
Telephone Number:
(504) 717-3895 (cell phone)

Date: June 11, 2008

APPENDIX I.

DISTRICT COURT'S JUDGMENT
AND REASONS FOR JUDGMENT

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 1998-18177 DIVISION "L" SECTION 6

PINCKNEY A. WOOD (PRESIDENT, COALITION OF LOUISIANA ANIMAL ADVOCATES)

VERSUS

BOB DEL GIORNO, WWL AM, AND SINCLAIR COMMUNICATIONS, INC.

FILED:_____ DEPUTY CLERK:_____

JUDGMENT

This matter came for hearing on the 18th day of March, 2005 on Plaintiff's Motion for Partial Summary Judgment and on Defendant's Cross Motion for Summary Judgment.

PRESENT: PLAINTIFF IN PROPER PERSON;
AND

EDWIN FLESHMAN, attorney for DEFENDANTS.

When, after considering the law and evidence the Court hereby renders judgment as follows;

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Partial Summary Judgment is hereby DENIED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant's Cross Motoin for Summary Judgment is hereby GRANTED.

New Orleans, Louisiana this _____ day of May, 2005.
[12th written on the line]

[s/Signature of Judge Kern A. Reese]
HON. KERN A. REESE
JUDGE, DIVISION "L"

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 1998-18177 DIVISION "L" SECTION 6

PINCKNEY A. WOOD (PRESIDENT, COALITION OF LOUISIANA ANIMAL ADVOCATES)

VERSUS

BOB DEL GIORNO, WWL AM, AND SINCLAIR COMMUNICATIONS, INC.

FILED:_____ DEPUTY CLERK:_____

REASONS FOR JUDGMENT

This matter came for hearing on the 18th day of March, 2005 on Plaintiff's Motion for Partial Summary Judgment and on Defendant's Cross Motion for Summary Judgment.

PRESENT: PLAINTIFF IN PROPER PERSON;
AND

EDWIN FLESHMAN, attorney for
DEFENDANTS.

When, after considering the law and evidence the Court hereby renders judgment for the following reasons;

The Court finds that the statement made by Bob Del Giorno that Plaintiff is "an absolute fraud" is not in the context of accusing Plaintiff of a crime. The comment does not arise to the level of defamation per se. Therefore, the Court hereby GRANTS Defendant's Motion for Summary Judgment.

New Orleans, Louisiana this _____ day of May, 2005. [12th written on the line]

[s/Signature of Judge Kern A. Reese]
HON. KERN A. REESE
JUDGE, DIVISION "L"

APPENDIX II.

OPINION OF THE
LOUISIANA 4TH CIRCUIT COURT OF APPEAL

[Transcribed below is the majority opinion of the three-judge panel of the Louisiana 4th Circuit Court of Appeal, and below that the dissent of one of the judges. All typographical errors are as they were in the original documents, including the mis-spelling of the Plaintiff's name as "Pickney".]

PINCKNEY A. WOOD (PRESIDENT, COALITION OF LOUISIANA ANIMAL ADVOCATES)	*	NO. 2006-CA-1612
	*	COURT OF APPEAL
	*	FOURTH CIRCUIT
VERSUS		
	*	STATE OF LOUISIANA
BOB DEL GIORNO, WWL AM, AND SINCLAIR COMMUNICATIONS, INC.	*	
	*	

****

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 98-18177, DIVISION "L-6"
Honorable Kern A. Reese, Judge

******

Judge Edwin A. Lombard

******

(Court composed of Chief Judge Joan Bernard Armstrong, Judge Charles R. Jones, Judge Edwin A. Lombard)

JONES, J., DISSENTS IN PART AND CONCURS IN PART.

Pinckney A. Wood
6001 Colbert Street
New Orleans, LA 70124

In Proper Person, PLAINTIFF/APPELLANT

Edwin W. Fleshman
TAYLOR PORTER BROOKS & PHILLIPS, L.L.P.
451 Florida Street Suite 800
P.O. Box 2471
Baton Rouge, LA 70821-2471

COUNSEL FOR THE DEFENDANT/APPELLEE

AFFIRMED

DEC 19 2007

In this defamation action, Plaintiff appeals the judgment of the district court, which granted Summary Judgment in favor of the Defendants, and denied Plaintiff's Motion for Summary Judgment, Our *de novo* review of the record supports the district court's judgment. Accordingly, we affirm.

Relevant Facts

The relevant facts in this case are not in dispute. Plaintiff, Pickney Wood ("Wood"), a humane rights advocate and educator, wrote to the producers of the Andre' Trevigne Show, a radio talk show which aired on WWL AM in New Orleans, hoping to be invited as an in-studio guest to discuss the topic of "canned hunts"[1] on the air. The show's producers contacted Wood and invited him to be a guest on the October 27, 1997 broadcast of the show. The normal format of the show was to have someone present a topic and then have listeners call in with comments or questions.

Wood was there representing the Coalition of Louisiana Animal Advocates, a non-profit charity over which he was acting as president. Bob Del Giorno ("Del Giorno"), an avid hunter and outdoorsman, who is an employee of WWL and host

---

[1] Canned hunts are commercial enterprises wherein animals are kept in fenced enclosures and "hunted" and killed by paying customers.

of WWL's morning show, also joined the show as an on-air guest to give his opposing opinion on the topic. Things became heated during the show as Del Giorno and Wood argued their positions back and forth. Del Giorno continuously interrupted and contradicted Wood and made several rude comments to and/or about Wood including: "The man is a fraud.

He is a complete fraud!;" "Everything you've said so far is out-and-out lying!;" and, "You're an idiot!" Wood too, made some comments back to Del Giorno.

A year later, Wood filed suit against Del Giorno, WWL AM, and Sinclair Communications, Inc. ("Sinclair") ("collectively referred to as Defendants"), alleging that Del Giorno's comments were defamatory and that he is entitled to damages. Wood alleged that WWL and Sinclair were liable because they did nothing to make amends for Del Giorno's alleged defamatory remarks. Wood then filed a motion for summary judgment arguing that Del Giorno's comments constituted defamations *per se*." In response, Defendants filed a cross-motion for summary judgment asserting thast Wood's claims did not satisfy the elements required for a defamation action. The trial court heard the motions simultaneously and ultimately denied Wood's motion while granting the Defendant's motion. The court found that Del Giorno's comments did not rise to the level of defamation *per se* and that his comment that Wood was an absolute fraud was not intended to acuse Wood of a crime. The court denied Wood's motion for reconsideration. This appeal followed.

Law and Argument

In his appeal, Wood argues that the trial court erred in denying his motion for summary judgment because there was no genuine issue of material fact at issue and that Del Giorno's comments were defamatory *per se*. Wood also argues that

2 [end of page - page number at bottom of page]

the trial court erred in granting Defendant's cross motion for summary judgment. Specifically, Wood argues that the Del Giorno's words were defamatory, Del Giorno is not entitled to the media defendant privilege, and that Del Giorno acted with actual malice. In the alternative, Wood argues that because discovery was not complete, the matter was not ripe for summary judgment.

Standard of Review and Summary Judgment Standard

Appellate courts review motions for summary judgment *de novo* under the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. *Champagne v. Ward,* 03-3211, p. 4 (La. 1/19/05), 893 So. 2d 773, 776. Summary Judgment is appropriate when there is no genuine issue of material fact and the mover is entitled to judgment as a matter of law. La. Code Civ. Proc. Art. 966(B). Summary Judgment is favored under our law and shall be construed to secure the just, speedy, and inexpensive determination of every action. La. Civ. Proc. Art. 966(A)(2).

Moreover, because of the chilling effect on the exercise of free speech, defamation actions have been found particularly susceptible to summary judgment. *Kennedy v Sheriff of East Baton Rouge,* 05-1418 (La. 7/10/06), 935 So. 2d 669. The Louisiana Supreme Court has held that "summary adjudication is a useful procedural tool and an effective screening device for avoiding the unnecessary harassment of defendants by unmeritorious actions which threaten

the free exercise of rights of speech and press." See *Id.* P.25, 935 So. 2d 586.

Defamation

Defamation is a tort which involves the invasion of a person's interest in his or her reputation and good name. *Costello v. Hardy*, 03-1146, p. 12 (La. 1/21/04), 864 So. 2d 129, 139; *Fitzgerald v. Tucker*, 98-2313, p. 10 (La. 6/29/99), 737 So. 2d

3 [end of page - page number at bottom of page]

706, 715; *Trentecosta v. Beck*, 96-2388, p. 10 (La. 10/21/97), 703 So. 2d 552, 559; *Sassone v. Elder*, 626 So. 2d 345, 350 (La. 1993). A successful claimant in a defamation action must establish the following elements: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault (negligence or greater) on the part of the publisher; and resulting injury. Trentecosta, 96-2388, p. 10, 703 So. 2d at 559. The fault requirement is often set forth in the jurisprudence as malice, actual or implied. *See Cangelosi v. Schwegmann Bros. Giant Super Markets*, 390 So. 2d 196, 198 (La. 1980). If even one of the required elements of the tort is lacking , the cause of action fails. *Costello, supra; See also, Douglas v. Thomas*, 31,470, p. 3 (La. App. 2 Cir. 2/24/99),728 So. 2d 560, 562, *writ denied*, 99-0835 (La. 5/14/99), 741 So, 2d 661; *Kosmitis v. Baily*, 28,585, p. 2 (La. App. 2 Cir. 12/20/96),685 So. 2d 1177, 1180. Even when a plaintiff makes a prima facie showing of the essential elements of

defamation, recovery may bwe precluded if the defendant shows either that the statement was true, or that it was protected by privilege, absolute or qualified. *Doe v. Grant*, 01-0175, p. 9 (La. App. 4 Cir. 1/29/03), 839 So. 2d 408, 416, *writ denied*, 03-0604 (La. 5/2/03), 842 So. 2d 1102.

Wood contends that Del Giorno's remarks, specifically his references to Wood as a liar and a fraud, are defamatory *per se*, or are, at the very least susceptible to defamatory meaning, since they tend to harm his professional reputation as an advocate and educator.

Words which expressly or implicitly accuse another of criminal conduct, or which by their very nature tend to injure one's personal or professional reputation, even without considering extrinsic facts or surrounding circumstances, are considered defamatory *per se*. *Komitis*, 28,585 at 4, 685 So. 2d at 1180;

4 [end of page - page number at bottom of page]

Lemeshewsky v Dumaine, 464 So. 2d 973, 975 (La. App. 4 Cir. 1985). When a plaintiff proves publication of words that are defamatory *per se*, the elements of falsity and malice (or fault) are presumed, but may be rebutted by the defendant. Komitis, 28,585 at 4, 685 So. 2d at 1180.

The trial court found that Del Giorno's comments did not rise to the level of *per se* defamation. The court specifically held that Del Giorno's comment

that "He is an absolute fraud" is "not in the context of accusing Plaintiff of a crime." We agree with the trial court. Del Giorno made no reference to any criminal offense on the part of Wood. Del Giorno's reference to Wood being a fraud, or a liar, does not necessarily imply, in the mind of a listener of ordinary intelligence and sensitivity, that Wood is guilty of the crime of fraud. Moreover, we do not believe that Del Giorno's comments are of the type that would, by their very nature, injure Wood's personal or professional reputation as a humane rights advocate or educator. Thus for these reasons, we find that Del Giorno's references to Wood as a fraud and a liar are not defamatory *per se*. Accordingly, we find that the trial court's judgment denying Wood's Partial Motion for Summary Judgment on the issue of defamation *per se* was correct.

We now turn to the question of whether Del Giorno's remarks, taken in context, were susceptible of defamatory meaning. Defamatory words are, by definition, words which tend to harm the reputation of another so as to lower the person in the estimation of the community, to deter others from associating or dealing with the person, or otherwisew expose a person to contempt or ridicule. *Fitzgerald*, 98-2313, p. 11, 737 So. 2d at 716; *Trentecosta*, 96-2388, p. 10, 703 So. 2d at 559. Words which convey an element of personal disgrace, dishonesty, or disrepute are defamatory. *Fitzgerald*, 98-2313, p. 11, 737 So. 2d at 716. The

5 [end of page - page number at bottom of page]

question of whether a communication is capable of a particular meaning and whether that meaning is defamatory is ultimately a legal question for the court. *Sassone*, 626 So. 2d at 352. The question is answered by determining whether a listener could have reasonably understood the communication, taken in context, to have been intended in a defamatory sense. *Id.*

Defendants concede that Wood was treated very rudely by Del Giorno, but argue that Del Giorno's comments were not defamatory. Defendants contend that, considering the context of the situation wherein the comments were made, any reasonable person listening to the show would not believe that Del Giorno was actually accusing Wood of engaging in fraudulent behavior or dishonest business practices. Defendants argue that that Del Giorno's comments about Wood were merely opinions or hyperbole, rather than facts, and are therefore, not actionable. We agree.

The First Amendment freedoms afford, at the very least, a defense against defamation actions for expressing opinion. *Cooksey v. Stewart*, 41,336, p.7 (La. App. 2 Cir. 8/23/06), 938 So. 2d 1206, 1211. A pure statement of opinion, which is based totally on the speaker's subjective view and which does not expressly state or imply the existence of underlying facts, usually will not be actionable in defamation. *Id., citing Bussie v. Lowenthal*, 535 So. 2d 378 (La. 1988). Falsity is an indespensible element of any defamation claim, and a purely subjective statement can neither be true or false. *Id* p. 1211-1212. The opinion may be ostensibly in the form of a factual

statement if it is clear from the context that the speaker did not intend to assert another objective fact but only his personal comment on the facts which he had stated. *Id.* P. 1212. The crucial difference between statement of fact and opinion depends on whether ordinary persons
6 [end of page - page number at bottom of page]

hearing the statement complained of would be likely to understand it as an expression of the speaker's opinion, or as a statement of existing fact. *Mashburn v. Collin*, 355 So. 2d 879, 885 (La. 1977).

In considering the type of speech that falls beyond that which can support a defamation action, the United States Supreme Court has recognized that speakers may use language that is insulting, offensive, or otherwise inappropriate, but constitutes no more than "rhetorical hyperbole." Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970). Milkovich v Lorain Journal Co., 497 U.S. 1, 18-21 (1990).[2] Statements that are mere hyperbole cannot reasonably be understood to convey a false representation of fact. See Milkovich, 497 U.S. at 16-17.

Del Giorno's remarks to and about Wood were based upon his subjective view and no underlying facts were either stated or implied. Clearly, in the context that they were made, the remarks were nothing more than opinions and hyperbole. Del Giorno's reference to Wood as an "idiot," for example, in the context of a heated discussion over a controversial topic, is merely an opinion and is not

be likely to be understood by a normal listener to convey the false idea that Wood lacks normal mental capacity. Similarly, Del Giorno's remarks thatr Wood is a fraud and a liar cannot be understood to convey to the average listener that Wood is a person lacking moral character or untruthful in his business practices. It is unlikely that Del Giorno's remarks would have the effect of lowering Wood in the estimation of the community, of deterring others from associating with him, or

---

[3] Examples of hyperbole include referring to the negotiating position of a real estate developer as "blackmail," *Greenbelt Coop. Publ'g Ass'n, Inc. v. Bresler*, 398 U.S. 6, 13-14, 90 S.Ct. 1537, 1541-42, 26 L. Ed. 2d 6 (1970), defining a labor union "scab" to be a "traitor," *Nat. Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284-865, 94 S.Ct. 2770, 2781-82 (1974), or publishing a parody of an advertisement referring to a public figure, *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46. 50, 108 S.Ct. 876, 879, 99 L. Ed. 2d 41 (1988). IN these instances, no

7 [end of page - page number at bottom of page]

otherwise exposing him to contempt or ridicule. The remarks were plainly abusive words not intended to be taken literally as statements of fact. Accordingly, we find that Del Giorno's remarks, while rude and insulting, are not defamatory.

Moreover, even if Del Giorno's comments could be considered defamatory, they are protected speech and are subject to qualified privilege under the test of *New York Times v. Sullivan*, 376 U.S. 254 (1964), which balances the freedom of expression against the right to defend against defamation. In cases involving statements made about a public figure, the

Sullivan Court held that a plaintiff must prove actual malice, that is that the defendant either knew the statement was false or acted with reckless disregard for the truth. *Id.* The *Sullivan* Court noted that "debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on public officials." *Sullivan* at 721.

In the cases that followed *Sullivan*, the Supreme Court broadened the scope of the constitutional privilege from "public officials" to "public figures," including "limited purpose public figures." *See Curtis Publishing Co. v. Buttts*, 388 U.S. 130 (1967) and *Gertz V. Robert Welsh, Inc.*, 418 U.S. 323 (1974). A limited purpose public figure is an individual who voluntarily injects himself into a particular public controversy, such as by "inviting attention and comment," and thereby becomes a public figure in connection with that subject. *See Trotter v. Jack Anderson Enterprises, Inc.*, 818 F. 2d 431 (5th Cir. 1987).

We find that pursuant to Sullivan and its progeny, Wood became a limited purpose public figure when he agreed to be on the Andre' show to discuss and

---

reasonable inference could be drawn that the individual identified in the statements, as a matter of fact, engaged in the conduct described.

8 [end of page · page number at bottom of page]

debate the controversial topic of canned hunts and to represent his animal rights organization. The topic of canned hunts was a matter of public concern, which is evident by the fact that listeners of the Andre' show that day were interested enough in the topic to call in and comment on the issue. Because Wood was a limited purpose public figure, the actual malice standard must be applied in determining the Defendants' liability. Here, Wood presented no credible evidence that Del Giorno acted with "actual malice" in making the comments. Without this showing, Wood cannot succeed in prosecuting this action against the Defendants. Accordingly, even if the comments were defamatory, which we deny, the district court did not err in granting Defendants' motion for summary judgment.

Wood finally attempts to avoid summary judgment by suggesting that additional discovery is needed to determine his status as a limited purpose public figure, Del Giorno's status as a media defendant, and the topic of canned hunts as a matter of public concern. This argument is unpersuasive since Wood has not shown that further discovery would produce any new evidence creating an issue of fact. Because there are no material facts at issue, this matter was ripe for summary judgment.

Having found, as we do above, that Wood has not been defamed by the comments made by Del Giorno, we affirm the judgment of the trial court granting summary judgment to defendants and in denying plaintiff's motion for summary judgment. There are no genuine issues of material fact and the judgment

of the trial court is affirmed. Costs of this appeal are assessed to the Plaintiff, Pickney Wood.

AFFIRMED

9 [end of page - page number at bottom of page]

[initialed by Judge Edwin A. Lombard and Chief Judge Joan Bernard Armstrong]

PINCKNEY A. WOOD (PRESIDENT, COALITION OF LOUISIANA ANIMAL ADVOCATES)	*	NO. 2006-CA-1612
	*	COURT OF APPEAL
	*	FOURTH CIRCUIT
VERSUS		
	*	STATE OF LOUISIANA
BOB DEL GIORNO, WWL AM, AND SINCLAIR COMMUNICATIONS, INC.	*	

****

JONES, J., DISSENTS IN PART AND CONCURS IN PART.

The trial court and now this Court, in considering defendant's motion for summary judgment, hav determined the intent of a party. If intent is not fact based, what is? Further, intent is so fact intensive that it clearly lends itself to a determination that genuine issues of material fact preclude the granting of summary judgment in this matter.

Further, I would correct the procedural error of plaintiff. He seeks to appeal the denial of his motion for summary judgment. Our review of a denial of a motion for summaty judgment is under our supervisory judgment. Thus, as to the appeal of the denial of the plaintiff's motion for summary judgment, I would convert the appeal to a writ application for supervisory writ, and deny his writ application. In this regard I am in concurrence with the majority.

[initialed by Judge Charles R. Jones]

APPENDIX III.

SUPREME COURT OF LOUISIANA
NOTIFICATION OF DENIAL
OF APPLICATION FOR WRIT OF CERTIORARI

The Supreme Court of the State of Louisiana

PINCKNEY A. WOOD (PRESIDENT, COALITION OF LOUISIANA ANIMAL ADVOCATES)

VS. NO. 2008-C-0151

BOB DEL GIORNO, WWL AM, AND SINCLAIR COMMUNICATIONS, INC.

IN RE: Wood, Pinckney; - Plaintiff; Applying for Writ of Certiorari and/or Review, Parish of Orleans, Civil District Court Div. L, Nos. 1998-18177; to the Court of Appeal, Fourth Circuit, No. 2006-CA-1612

March 14, 2008

Denied.

CDT, PFC, CDK, BJJ, JPV, JTK, JLW
[initials of justices]

Supreme Court of Louisiana
March 14, 2008

[s/Signature of Katherine A. Fontana]
Deputy Clerk of Court
For the Court

APPENDIX IV.

AMEDMENT I, CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

RELEVANT LOUISIANA STATUTES

R.S. 14:47

§47. Defamation

Defamation is the malicious publication or expression in any manner, to anyone other than the party defamed, of anything which tends:

(1) To expose any person to hatred, contempt, or ridicule, or to deprive him of the benefit of public confidence or social intercourse; or

(2) To expose the memory of one deceased to hatred, contempt, or ridicule; or

(3) To injure any person, corporation, or association of persons in his or their business or occupation.

Whoever commits the crime of defamation shall be fined not more than five hundred dollars, or imprisoned for not more than six months, or both.

Amended by Acts 1968, No. 647, §1.

R.S. 14:48

§48. Presumption of malice

Where a non-privileged defamatory publication or expression is false it is presumed to be malicious unless a justifiable motive for making it is shown.

Where such a publication or expression is true, actual malice must be proved in order to convict the offender

R.S. 14:49

§49. Qualified privilege

A qualified privilege exists and actual malice must be proved, regardless of whether the publication is true or false, in the following situations:

(1) Where the publication or expression is a fair and true report of any judicial, legislative, or other public or official proceeding, or of any statement, speech, argument, or debate in the course of the same.

(2) Where the publication or expression is a comment made in the reasonable belief of its truth, upon,

(a) The conduct of a person in respect to public affairs; or

(b) A thing which the proprietor thereof offers or explains to the public.

(3) Where the publication or expression is made to a person interested in the communication, by one who is also interested or who stands in such a relation to the former as to afford a reasonable ground for supposing his motive innocent.

(4) Where the publication or expression is made by an attorney or party in a judicial proceeding.

R.S. 51:1905

§1905. Prohibited acts

A. It shall be unlawful for any charitable organization, solicitor therefor, or person owning, managing, directing, representing, or acting as agent for any charitable organization, an organization soliciting contributions for any charitable organization, or an organization claiming to sell merchandise, products, goods, or services for charitable purposes to engage in unfair methods of competition, unfair or deceptive practices, or misrepresentation.

100

(2)

No. 07-1572

FILED

JUL 18 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

PINCKNEY A. WOOD,

Petitioner,

versus

BOB DEL GIORNO, WWL AM, AND SINCLAIR COMMUNICATIONS, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Louisiana Court Of Appeal, Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DEBORAH E. LAMB
Louisiana Bar Roll No. 18991
Counsel of Record
for Respondents
TAYLOR, PORTER, BROOKS
& PHILLIPS L.L.P.
P.O. Box 2471
Baton Rouge, LA 70821-2471
Telephone: (225) 387-3221

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Petitioner and Bob Del Giorno, a defendant and employee of the radio-station defendant herein, appeared opposite Petitioner, the president of an animal advocacy group, on a radio talk show to debate the topic of canned hunts. During the course of the show, Del Giorno made seemingly derogatory remarks about Petitioner. Petitioner filed a state law defamation suit in Louisiana state court under Louisiana law. The state district court granted summary judgment to the defendants/respondents, and its ruling was affirmed by the state court of appeal. The questions to be considered by this Court in deciding whether the Louisiana appellate court erred are the following:

1. Were Del Giorno's remarks defamatory?
2. Were Del Giorno's remarks defamatory *per se*?
3. Were Del Giorno's remarks protected expressions of opinion?
4. Was Petitioner prejudiced by procedural error in the courts below?

CORPORATE DISCLOSURE STATEMENT

Respondent, Sinclair Media II, Inc., voluntarily appears herein as the successor of Sinclair Radio of New Orleans, Inc.

Sinclair Media II, Inc. is a wholly owned subsidiary of Sinclair Communications, LLC and an indirect subsidiary of Sinclair Television Group, Inc. and Sinclair Broadcast Group, Inc.

Petitioner named the following defendants in this lawsuit: Bob Del Giorno, WWL AM, and Sinclair Communications, Inc. WWL AM, a radio station, is not a legal entity. In 1997, when Petitioner appeared as a guest on *The André Show*, Sinclair Radio of New Orleans, Inc. (not Sinclair Communications, Inc.) owned the radio station. In August 1998, Sinclair Radio of New Orleans, Inc. merged into Sinclair Radio of New Orleans, LLC, with the limited liability company surviving the merger. In December 2003, Sinclair Radio of New Orleans, LLC merged into Tuscaloosa Broadcasting, Inc., which survived, and in turn, merged into Sinclair Media II, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
STATEMENT OF THE CASE	1
A. Facts	1
B. Procedural History	3
SUMMARY OF THE ARGUMENT	5
LAW AND ARGUMENT	7
A. Del Giorno's words were neither defamatory nor defamatory *per se*	9
B. Del Giorno's words were protected expressions of opinion	13
C. Del Giorno's speech is subject to a qualified privilege under *New York Times Co. v. Sullivan*	15
1. Petitioner is a public figure	16
2. All respondents are "media defendants"	17
3. Canned hunts are a matter of public concern	19
4. Petitioner did not meet his burden of proving that Bob Del Giorno's words were spoken with "actual malice"	20
D. Petitioner was not the victim of procedural errors below	22

TABLE OF CONTENTS – Continued

Page

1. Discovery was complete 23
2. Petitioner lost no "procedural advantage" by having the cross-motions heard at the same time 24
3. Petitioner's due process rights were satisfied..... 25

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).....20

Armstead v. Schwegmann Giant Supermarkets, Inc., 618 So.2d 1140 (La.App. 4th Cir. 1993), *writ denied*, 629 So.2d 347 (La. 1993).....23, 24

Brasseaux v. Town of Mamou, 99-1584 (La. 1/19/00), 752 So.2d 815 18

Brown v. News-World Publ'g Corp., 245 So.2d 430 (La.App. 2d Cir. 1971) 9

Bussie v. Larson, 501 F.Supp. 1107 (M.D. La. 1980).....17

Bussie v. Lowenthal, 535 So.2d 378 (La. 1988) 14

Cashio v. Holt, 425 So.2d 820 (La.App. 5th Cir. 1982), *writ denied*, 430 So.2d 94 (La. 1983).....9

Costello v. Hardy, 03-1146 (La. 1/21/04), 864 So.2d 129 .....5, 8

Curtis Publ'g Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967).....16

Davis v. Southern Sav. Ass'n, 557 So.2d 1011 (La.App. 4th Cir. 1990) 9

Doe v. Grant, 01-0175 (La.App. 4th Cir. 1/29/03), 839 So.2d 408, *writ denied*, 03-0604 (La. 5/2/03), 842 So.2d 1102.....9

TABLE OF AUTHORITIES – Continued

Page

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985) 17

Fallon v. Sullivan, 94-1927 (La.App. 4th Cir. 2/23/95), 650 So.2d 1232, *writ denied*, 95-0769 (La. 4/28/95), 653 So.2d 601 18

Faust v. Greater Lakeside Corp., 98-2853 (La.App. 4th Cir. 9/12/01), 797 So.2d 748, *writ denied*, 01-3149 (La. 2/1/02), 808 So.2d 343 18

Fitzgerald v. Tucker, 98-2313 (La. 6/29/99), 737 So.2d 706 8

Fourcade v. City of Gretna, 91-CA-957 (La.App. 5th Cir. 3/31/92), 598 So.2d 415 9

Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) 16

Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970) 12, 13

Harrington v. La. State Bd. of Elementary and Secondary Educ., 97-1670 (La.App. 4th Cir. 5/20/98), 714 So.2d 845, *writ denied*, 98-2170 (La. 11/20/98), 728 So.2d 1287 18

Hustler Magazine v. Falwell, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988) 7, 13, 20, 21, 22

Kennedy v. Sheriff of East Baton Rouge, 05-1418 (La. 7/10/06), 935 So.2d 669 5

Lee v. Woodley, 615 So.2d 349 (La.App. 1st Cir. 1993), *writ denied*, 618 So.2d 411 (La. 1993) 14

TABLE OF AUTHORITIES – Continued

Page

Mashburn v. Collin, 355 So.2d 879 (La. 1977) 14

Milkovich v. Lorain Journal Co., 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990) 14

New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) .....*passim*

Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974).....13

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986).....21

Sassone v. Elder, 626 So.2d 345 (La. 1993) 5

Spellman v. Peoples Bank and Trust Co. of St. Bernard, 544 So.2d 10 (La.App. 4th Cir. 1989), *writ denied*, 548 So.2d 327 (La. 1989).....23

Trentecosta v. Beck, 96-2388 (La. 10/21/97), 703 So.2d 552 .....8, 17

Trotter v. Jack Anderson Enterprises, Inc., 818 F.2d 531 (5th Cir. 1987) 16

Wattigny v. Lambert, 453 So.2d 1272 (La.App. 3d Cir. 1984), *writ denied*, 493 So.2d 1221 (La. 1986).....17

Weatherall v. Dep't of Health & Human Resources, 432 So.2d 988 (La.App. 1st Cir. 1983), *writ denied*, 437 So.2d 1150 (La. 1983).....9

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

U.S. Const. amend. I ..... *passim*

STATE STATUTES

La. Code Civ. P. art. 967(D) 23

La. R.S. 14:47 1

La. R.S. 14:48 1

La. R.S. 14:49 1

Maraist and Galligan, *Louisiana Tort Law*, Second Ed., § 19.02[8] 17

STATEMENT OF THE CASE

A. Facts

This is a state law, civil defamation case.[1] In 1997, petitioner, Pinckney Wood, then acting president of the Coalition of Louisiana Animal Advocates (CLAA), was a guest on *The André Show*, a radio talk show that is broadcast on WWL AM. Mr. Wood claims that he was defamed by a station employee, Bob Del Giorno, who appeared opposite Mr. Wood to present a different viewpoint on "canned hunting," the commercial practice of keeping wild game enclosed on relatively small tracts of land to increase the opportunity for a successful hunt. Heated exchanges and even name-calling are normal on *The André Show* and many other talk shows on radio and cable news networks, and this particular debate on canned hunts was no exception.[2] Both Mr. Wood and Mr. Del Giorno became emotionally charged and animated. Regrettably, Mr. Del Giorno called Mr. Wood an "idiot" and an "absolute fraud" during the show. His behavior was discourteous, but there is no evidence to conclude that anyone listening to the show actually believed Mr. Wood to have diminished intellectual capacity or

---

[1] The Louisiana statutes cited in appendix IV of the petition, La. R.S. 14:47, 14:48 and 14:49, are criminal statutes and are not applicable to this case.

[2] Petitioner's reference on p. 7 of his petition to Ms. Trevigne's alleged statement regarding "the most humiliating event" of her career should be stricken and not considered by this Court as it is not in evidence in the proceedings below.

to have engaged in fraudulent behavior. The audience was informed that Mr. Del Giorno did not know Mr. Wood, personally, and that he was not familiar with canned hunts in general or with pending Congressional legislation regarding canned hunts. More importantly, all but one of the listeners who called into the show that day rejected Del Giorno's opinion and chastised him for his "debating style" and for interrupting Mr. Wood. Ironically, if anyone's reputation was injured during the show, it was Bob Del Giorno's. Furthermore, during the show Del Giorno apologized for his emotional outbursts, explaining that he loves to hunt and worries that animal rights groups will succeed in taking that right away from him.

While Mr. Del Giorno's behavior was rude, his words were neither defamatory nor defamatory *per se*. At best, they were protected expressions of opinion uttered by a media defendant, a station employee, about a public figure, the acting president of the Coalition of Louisiana Animal Advocates, regarding a matter of public concern, canned hunting. No evidence suggests that Mr. Del Giorno spoke with actual malice toward Mr. Wood. In fact, Mr. Wood obviously understood the nature of the debate as he made aggressive and threatening moves toward Del Giorno,[3] and he engaged in some name-calling of his

---

[3] An audio recording and a written transcript of *The André Show* is in the record below. Petitioner cited to, but did not attach, the transcript to his petition. Respondents have not

(Continued on following page)

own, asserting that Del Giorno was "wasting people's time,"[4] "was a mess,"[5] and was "putting up a smoke-screen"[6] because he did not "know what [he] was talking about."[7]

B. Procedural History

Mr. Wood filed a partial-summary-judgment motion asking the trial court to render judgment on "the fact of defamation," separate and apart from any consideration of pecuniary loss. The defendants/respondents opposed Wood's motion and filed a cross motion for summary judgment asking the court to find that Wood could not meet his burden of proving defamation or any other claims asserted in his petition.[8] The Louisiana state district court heard both

---

attached the transcript either, but simply note for the Court that the transcript exists. The cited material is found at page 23, lines 12-18 of the written transcript, noted hereafter as Tr. 23:12-18.

[4] Tr. 8:20-22.

[5] Tr. 9:13.

[6] Tr. 27:14.

[7] Tr. 14:9.

[8] In addition to damages for defamation, Mr. Wood's petition asked for damages for interference with his ability to effectively communicate with the public; interference with the public's "ability to heed what was being said"; defamation of the entire Louisiana humane community; failure to make restitution to both Wood, personally, and to animal protectionists, generally; and failure to inform Wood about a show on this same topic that was broadcast later so that he could provide his views. The petition also asked for a public apology and significant air time,

(Continued on following page)

motions on the same day, March 18, 2005. It rendered judgment on May 12, 2005, denying Mr. Wood's partial-summary-judgment motion and granting the defendants' motion. Mr. Wood appealed both rulings. The Louisiana Court of Appeal for the Fourth Circuit affirmed both rulings, apparently exercising its appellate and supervisory jurisdiction,[9] although Mr. Wood filed but a single appeal. On March 14, 2008, the Louisiana Supreme Court denied Mr. Wood's application for a writ of certiorari.

Mr. Wood then filed a petition for writ of certiorari with this Court on June 11, 2008, which was placed on the docket on June 18, 2008. *The Court should decline to exercise its discretionary jurisdiction because none of the considerations governing review on certiorari are present in this state law defamation case.* When boiled down to its bare bones, Mr. Wood's petition asks this Court to do nothing more than

---

to Wood's satisfaction, to make a proper public presentation regarding canned hunts. In his summary-judgment motion, Wood accused Del Giorno of name-calling in violation of Louisiana's statute prohibiting unfair methods of competition, although Wood admitted that he was not soliciting funds for his organization at the time of the broadcast. Wood did not raise these issues in response to the defendants/respondents' summary-judgment-cross motion, or on appeal, or in his writ applications. Therefore, defendants/respondents do not address them here.

[9] Although the Fourth Circuit did not specifically address the procedural issue in the main opinion, Judge Jones noted in his partial concurrence that the court's review of a denial of summary judgment is conducted under its supervisory, not appellate, jurisdiction.

review the Louisiana state court's application of properly stated rules of law to the facts of this case. Due to the chilling effect on free speech, defamation actions are particularly well suited to summary judgment,[10] and this case was no exception. At the time when the Louisiana district and appellate courts were called upon to decide whether Del Giorno's words were defamatory – a purely legal question[11] – no facts were in dispute. In evidence and available to both courts were the written transcript and audiotape of *The André Show*. The courts below correctly applied the law to the facts of this case and concluded that Del Giorno's words were not defamatory. There is no compelling reason for this Honorable Court to revisit the state courts' decisions.

SUMMARY OF THE ARGUMENT

Under Louisiana law, defamation requires proof of four essential legal elements. The initial question is always the same: Were the words defamatory? In this case, the words were regrettable, even insulting, but not defamatory. Taken in the context in which they were spoken – on a radio talk show, which was intended to entertain as well as inform the audience,

---

[10] *Kennedy v. Sheriff of East Baton Rouge*, 05-1418 (La. 7/10/06), 935 So.2d 669.

[11] *Costello v. Hardy*, 03-1146 (La. 1/21/04), 864 So.2d 129, 140, citing *Sassone v. Elder*, 626 So.2d 345, 350 (La. 1993).

by a station employee who admittedly knew very little about the subject of canned hunts or pending federal legislation on the subject – the words did not expose Mr. Wood to contempt, hatred, ridicule, or disgrace. Nor did they injure his reputation, occupation, or public standing. At best, Mr. Del Giorno's words were rhetorical hyperbole. Even the most careless listener to the broadcast could not have believed Mr. Wood to be an idiot, a liar, or a fraud.

Moreover, Del Giorno's words were protected expressions of opinion. Although he did not actually say, "In my opinion you are a fraud," the context of the program made clear that Del Giorno was expressing nothing more than his opinion and not a statement of fact. When a statement expresses an opinion, it is not actionable defamation unless it implies a false and libelous fact and it is expressed with malice. The context in which Del Giorno referred to Mr. Wood as an absolute fraud makes clear that Del Giorno was expressing his opinion, not an objective fact, about Wood's knowledge of the attempts being made to regulate canned hunts. Therefore, the words were not defamatory.

Finally, Del Giorno's words were protected speech that are subject to a qualified privilege under the *New York Times Co. v. Sullivan*[12] standard, which requires a finding of actual malice in cases involving

---

[12] *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

statements about public figure plaintiffs. Mr. Wood appeared on *The André Show* in his capacity as president of the CLAA, an organization dedicated to changing public opinion and urging the enactment of laws regarding animal welfare. By choosing to become a public spokesperson about a matter of public concern – canned hunts – Mr. Wood subjected himself to personal challenge and criticism that must be tolerated under the First Amendment guarantee of free speech. Under the standards articulated by this Court in, for example, *Hustler Magazine v. Falwell*,[13] Del Giorno's words may have been false and valueless, yet not malicious due to the First Amendment's "recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."[14]

The Louisiana Court of Appeal for the Fourth Circuit correctly reviewed and decided the case below. This Court should deny Mr. Wood's petition for writ of certiorari.

LAW AND ARGUMENT

Defamation is a tort that involves the invasion of a person's interest in his or her reputation and good

[13] *Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988).

[14] *Id.*, 485 U.S. at 50.

name.[15] Under Louisiana law, the plaintiff claiming defamation must establish four essential elements: (1) a false and defamatory statement concerning another; (2) an unprivileged communication to a third party; (3) fault (negligence or greater) on the part of the publisher; and (4) resulting injury.[16] The fault requirement is often described in the Louisiana jurisprudence as malice, actual or implied.[17] Thus, in order to prevail on a defamation claim, the plaintiff must prove that the defendant, acting with actual malice or other fault, published a false statement with defamatory words that caused damages.[18] If even one element is lacking, the cause of action fails.[19]

Defamatory words are those that tend to harm the reputation of another by lowering the community's estimation of the person, to deter others from associating or dealing with the person, or to expose a person to contempt or ridicule.[20] In some cases, even if words might otherwise be defamatory, recovery is precluded if the defendant is able to show either that the statement was true or that it was protected by a

---

[15] *Costello v. Hardy*, 03-1146 (La. 1/21/04), 864 So.2d 129, 139.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 139-40.

[19] *Id.* at 140.

[20] *Id.*, citing *Fitzgerald v. Tucker*, 98-2313 (La. 6/29/99), 737 So.2d 706, 716, and *Trentecosta v. Beck*, 96-2388 (La. 10/21/97), 703 So.2d 552, 559.

privilege.[21] In this case, the words uttered by Del Giorno were not defamatory. But even if Del Giorno's utterances were defamatory, they are protected speech and, thus, are not actionable defamation.

A. Del Giorno's words were neither defamatory nor defamatory *per se*.

Words are defamatory if they "tend to expose a person to contempt, hatred, ridicule, or disgrace, or to injure him in his reputation, occupation, or public standing."[22] The intent and meaning of the alleged defamatory statement must be gathered from the context as well as the words, and all parts of the statement and the circumstances of its publication must be considered to derive the true meaning.[23] The test is the effect of the statement *on those whom it was intended to reach*.[24] In this case, and conceding that the plaintiff was treated badly, the context reveals that he was *not* defamed.

---

[21] *Doe v. Grant*, 01-0175 (La.App. 4th Cir. 1/29/03), 839 So.2d 408, 416, *writ denied*, 03-0604 (La. 5/2/03), 842 So.2d 1102.

[22] *Fourcade v. City of Gretna*, 91-CA-957 (La.App. 5th Cir. 3/31/92), 598 So.2d 415; *Cashio v. Holt*, 425 So.2d 820 (La.App. 5th Cir. 1982), *writ denied*, 430 So.2d 94 (La. 1983); *Weatherall v. Dep't of Health & Human Resources*, 432 So.2d 988 (La.App. 1st Cir. 1983), *writ denied*, 437 So.2d 1150 (La. 1983); *Brown v. News-World Publ'g Corp.*, 245 So.2d 430 (La.App. 2d Cir. 1971).

[23] *Brown*, 245 So.2d 430; *Davis v. Southern Sav. Ass'n*, 557 So.2d 1011 (La.App. 4th Cir. 1990).

[24] *Brown*, 245 So.2d 430.

Regrettably, Del Giorno called Mr. Wood both an "absolute fraud" and an "idiot" during the radio show. However, due to the nature of the radio talk show, there is no basis for asserting that any listener of ordinary intelligence or sensibility could have believed that Mr. Wood was guilty of the crime of fraud or of dishonest business practices. Certainly, no one listening actually believed that Mr. Wood was a person of diminished intellectual capacity. The context in which the words were spoken makes clear that they were not taken literally by the audience. The audience was informed that Mr. Del Giorno did not know Mr. Wood[25] and that he was not familiar with pending Congressional legislation on canned hunts.[26] The audience clearly was advised that Del Giorno was not an expert on the topic of canned hunts, thereby undercutting any conclusion Del Giorno may have reached regarding Mr. Wood's qualifications or knowledge about the subject. More importantly, all but one of the listeners who called into the show that day rejected Del Giorno's opinion and chastised him for his "debating style" and for interrupting Mr. Wood.[27] Ironically, if anyone was "exposed to contempt, hatred, ridicule, or disgrace" or was "injured in his reputation, occupation, or public standing," it was Bob Del Giorno, not Mr. Wood. Furthermore, during

---

[25] Tr. 3:14-15.

[26] Tr. 3:23-25.

[27] Tr. 11:8-9; 17:20-21; pp. 20-23; 24:21-22; 28:2-8; 31:25 through 32:17.

the show, Del Giorno apologized for his emotional outbursts, explaining that he loves to hunt and is concerned that animal rights groups will succeed in taking that away from him.[28] Finally, despite having asserted conclusory allegations of injury, Mr. Wood offered no proof in opposition to defendants' summary-judgment motion that he was damaged, monetarily or in any other way – one of the essential elements of a defamation claim. In fact, he conceded in his writ application to the Louisiana appeals court that his alleged injury "may not have significance in terms of monetary considerations."[29] Monetary considerations aside, Mr. Wood offered no *prima facie* proof to create an issue of fact in the courts below that he suffered damage of any kind – to his reputation, his business, his ability to fund-raise. Nevertheless, he continues to make conclusory assertions to this Court that he has been damaged in ways that he failed to prove in the courts below.

Petitioner also argues that Mr. Del Giorno's words are defamatory *per se*, *i.e.*, words that by themselves, without considering extrinsic facts and circumstances, result in "contempt, hatred, ridicule, disgrace" or injure a person in his "reputation, occupation, or public standing." The significance of the *per se* classification

---

[28] Tr. 31:14.

[29] Respondents have not attached a copy of Mr. Wood's writ application to the Louisiana Court of Appeal for the Fourth Circuit, but simply note that the quoted language is found at p. 6 of the application, which forms a part of the record below.

is that, in a matter governed solely by state law (*i.e.*, the classic common law defamation claim), words that are defamatory *per se* can give rise to a presumption of falsity and malice, thereby shifting the burden to the defendant to rebut the presumption. But even a finding of defamation *per se* is not, as Mr. Wood seems to suggest, all that is required to establish liability even in a classic common law defamation case. In any event, in this case, Mr. Del Giorno's lapse of courtesy clearly did not amount to defamation *per se*, and his words were nothing more than rhetorical hyperbole. Hyperbole cannot reasonably be interpreted as stating an actual fact.

In *Greenbelt Cooperative Publishing Ass'n v. Bresler*,[30] a real estate developer engaged in negotiations with a local city council for a zoning variance over certain property he owned while simultaneously negotiating the sale to the city of other property he owned. A newspaper published comments calling the developer's negotiating position "blackmail." This Court rejected the developer's contention that liability could be premised solely on the use of the word "blackmail." Under these circumstances, the *Greenbelt* Court reasoned that no one could have believed that the use of the word meant the developer committed the crime of blackmail: "even the most careless reader must have perceived that the word was no

---

[30] *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970).

more than rhetorical hyperbole, a vigorous epithet used by those who considered [the developer's] negotiating position extremely unreasonable."[31] Similarly, in *Letter Carriers v. Austin*,[32] this Court found that use of the word "traitor" to define a union "scab" did not present a sufficient basis for a defamation action under federal labor law since the term was used in a "loose, figurative" sense and was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members." Clearly, Del Giorno's words amounted to nothing more than rhetorical hyperbole – a lusty and imaginative expression of the contempt he felt for those whom he feared might be threatening his right to hunt – and were not sufficient to constitute defamation.

B. Del Giorno's words were protected expressions of opinion.

Courts recognize the inherent differences between statements of fact and statements of opinion, and when considering defamation claims, courts distinguish between the two due to the importance of

---

[31] *Id.*, 398 U.S. at 13-14. *See also, Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988) (First Amendment precluded recovery under state emotional distress action for ad parody which "could not reasonably have been interpreted as stating actual facts about the public figure involved").

[32] *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974).

conjecture to free speech.[33] If a statement expresses an opinion, the words are not actionable defamation unless the opinion implies a false and libelous fact, and the opinion is expressed with actual malice.[34] The context in which a statement is made is critical to determining whether it is one of fact or merely opinion. In *Mashburn v. Collin*,[35] the Louisiana Supreme Court discussed at length what constitutes "fair comment," writing that "the crucial difference between statements of fact and opinion depends upon whether ordinary persons hearing or reading the matter complained of would be likely to understand it as a statement of existing fact."[36] *Mashburn* involved a food critic's scathing review of a restaurant. The court found that the critic's comments were not defamatory, given that the defendant had actually eaten at the restaurant and that his review implied no unstated facts, such as the restaurant's sanitary condition, to justify the opinion. Similarly, Del Giorno's comments about Mr. Wood did not imply any false or libelous facts to substantiate his opinion. In fact, the audience was advised that Del Giorno's opinion was based on a very limited review of the

---

[33] *See, Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990) and *Mashburn v. Collin*, 355 So.2d 879 (La. 1977).

[34] *See, Bussie v. Lowenthal*, 535 So.2d 378 (La. 1988) and *Lee v. Woodley*, 615 So.2d 349 (La.App. 1st Cir. 1993), *writ denied*, 618 So.2d 411 (La. 1993).

[35] *Mashburn*, 355 So.2d 879.

[36] *Id.* at 885.

relevant documents and limited knowledge of the topic, leaving the listener to decide for himself whether Mr. Wood or Del Giorno was correct. Thus, the context in which Del Giorno called Mr. Wood a liar and a fraud makes clear that Del Giorno was merely expressing his personal opinion, unsupported by any false or libelous facts, regarding Wood's position on the attempts being made to regulate canned hunts. As such, Del Giorno's comments are protected expressions of opinion and are, therefore, exempt from a claim of defamation regardless of how insulting they may have been to Mr. Wood.

C. Del Giorno's speech is subject to a qualified privilege under *New York Times Co. v. Sullivan*.

Del Giorno's speech is protected by a qualified privilege under *New York Times Co. v. Sullivan*,[37] which balances the freedom of expression against the right to defend against defamation. *Sullivan* held that a plaintiff must prove actual malice, *i.e.*, that the defendant either knew the statement was false or acted with reckless disregard for the truth,[38] in cases involving statements about a public figure. In the cases that followed *Sullivan*, this Court expanded the

---

[37] *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

[38] *Id.* at 376 U.S. 283.

privilege from "public officials" to "public figures," including "limited purpose public figures."[39]

1. Petitioner is a public figure.

A limited purpose public figure is one who voluntarily injects himself into a particular public controversy and becomes a public figure in connection with that controversy by "inviting attention and comment."[40] Applying a label, such as "public figure," is a conclusion of law to be decided by the court based on the facts before it.[41] The Louisiana appeals court correctly concluded that Wood became a limited purpose public figure when he contacted *The André Show* seeking to appear in his capacity as president of the CLAA – an organization dedicated to changing public opinion and urging the enactment of laws – to debate the controversial topic of canned hunts. Contrary to Mr. Wood's assertion, he is not completely immune from having his credentials, character, motives, or reputation challenged just because he is a knowledgeable and sincere advocate of animal rights. By choosing to become a public spokesman for a matter of concern, he subjected himself to such attacks as a matter of law.

---

[39] *See Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

[40] *See Trotter v. Jack Anderson Enterprises, Inc.*, 818 F.2d 531 (5th Cir. 1987).

[41] *See Gertz*, 418 U.S. 323.

2. All respondents are "media defendants."

Petitioner argues that defendant Bob Del Giorno is not entitled to immunity from claims of defamation because he is not a media defendant. Whether Del Giorno was acting within the course and scope of his employment while a guest on the radio show raises interesting issues regarding the proper foundation required to invoke the constitutional privilege. Defendants have been unable to find any Supreme Court cases decided in the decades since *Sullivan* that provide clarity on the issue of media and non-media defendants. Nevertheless, since the First Amendment protects both free *speech* and a free *press*, it is not unreasonable to conclude that the *Sullivan* standard applies to non-media defendants as well.[42] As suggested by various scholars, the core question is whether the speech involves a matter of public concern.[43] As such, there was no need for the courts below to decide whether Del Giorno was or was

---

[42] *See Bussie v. Larson*, 501 F.Supp. 1107 (M.D. La. 1980) and *Wattigny v. Lambert*, 453 So.2d 1272 (La.App. 3d Cir. 1984), *writ denied*, 493 So.2d 1221 (La. 1986).

[43] *See*, Maraist and Galligan, *Louisiana Tort Law*, Second Ed., § 19.02[8]. *See also, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985) (involving a private figure plaintiff, a non media defendant, and a matter of private concern in which Court recognized danger of "chilling effect" on free speech inherent in any defamation claim); and *Trentecosta v. Beck*, 96-2388 (La. 10/21/97), 703 So.2d 552 (La. 1997) (recognizing qualified privilege for fair reporting of investigations or arrests to the press, and in turn, to the public).

not a media defendant, and they did not make any finding regarding his status. In the absence of such need, there is no material factual dispute as to his status that would have precluded summary judgment.

Alternatively, the defendants invite this Court to accept plaintiff's version of the facts, and then consider whether, as a matter of law, Del Giorno was acting as an employee of WWL AM. Clearly, he was. Del Giorno was not commanded by his employer to appear on *The André Show*, but he was acting as an employee of the station. An employee is generally considered to be in the course and scope of his employment if the conduct in question is of the character and nature that he is employed to perform, and it occurs substantially within the authorized limits of time and space, and it is activated at least in part by a purpose to serve the employer.[44] Del Giorno's participation in *The André Show* was similar in character and nature to what he was employed to do as a broadcast journalist. The broadcast originated from his normal place of employment during normal

---

[44] *Brasseaux v. Town of Mamou*, 99-1584 (La. 1/19/00), 752 So.2d 815. *See also, Faust v. Greater Lakeside Corp.*, 98-2853 (La.App. 4th Cir. 9/12/01), 797 So.2d 748, *writ denied*, 01-3149 (La. 2/1/02), 808 So.2d 343; *Harrington v. La. State Bd. of Elementary and Secondary Educ.*, 97-1670 (La.App. 4th Cir. 5/20/98), 714 So.2d 845, *writ denied*, 98-2170 (La. 11/20/98), 728 So.2d 1287; and *Fallon v. Sullivan*, 94-1927 (La.App. 4th Cir. 2/23/95), 650 So.2d 1232, *writ denied*, 95-0769 (La. 4/28/95), 653 So.2d 601.

work hours. And his appearance was motivated, at least in part, to serve his employer by providing the show with a guest having a different point of view than plaintiff. It is simply unreasonable to conclude that Del Giorno is not a media defendant. Whether Del Giorno is or is not a media defendant, however, is not necessary to the outcome of the case because, first, petitioner was not defamed and, second, the same First Amendment considerations are applicable when matters of public concern are involved, whether or not Del Giorno is a media defendant.

3. Canned hunts are a matter of public concern.

Mr. Wood's decision to become involved in a matter of public concern subjected him to abuses that must be tolerated to protect First Amendment guarantees of free speech. As noted in the *Sullivan* case, our country has made a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[45] That the subject of canned hunts was a public issue is evidenced by the number of listeners who called into the show to comment and by the number of volunteers, led by Mr. Wood, who work tirelessly to cause legislation to be

---

[45] *Sullivan*, 376 U.S. at 270; 84 S.Ct. at 721.

enacted to prevent cruelty to animals. As the relevant facts regarding Mr. Wood's status as a limited public figure and the status of canned hunts as a public issue were not in dispute, this case was ripe for summary judgment using the actual malice standard of *Sullivan*.

4. Petitioner did not meet his burden of proving that Bob Del Giorno's words were spoken with "actual malice."

Summary judgment is encouraged in defamation cases because of the high standard of proof required, *i.e.*, actual malice, which must be shown with "convincing clarity" (in other words, by clear and convincing evidence), and because of the chilling effect that protracted litigation has on First Amendment rights.[46] Mr. Wood presented no evidence, let alone clear and convincing evidence, that Del Giorno acted with actual malice. Therefore, summary judgment was appropriate.

The crux of Mr. Wood's argument is that hyperbole without humor is not hyperbole, and since Del Giorno was not being humorous when he exclaimed that Mr. Wood was a fraud and a liar, then by definition Del Giorno acted with actual malice. The fallacy of Mr. Wood's argument is perhaps best illustrated by considering the case of *Hustler Magazine v.*

---

[46] *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Falwell.[47] Hustler Magazine published an advertising parody of a then popular advertising campaign by a liquor distributor in which the Rev. Jerry Falwell appeared to have said during an interview that he had engaged in a drunken incestuous relationship with his mother. Hustler deliberately fabricated the entire interview and no one at Hustler deemed the statements to be true. To the contrary, the statements were known to be false when published; thus, they were made with actual knowledge of their falsity and not mere reckless disregard for the truth.

This Court held that the First Amendment prohibited damages for defamation or intentional infliction of emotional distress under the facts of the case, writing that at "the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."[48] The Court further noted that, although false statements of fact are "valueless," "interfere with the truth-seeking function of the marketplace of ideas," and may "cause damage to a person's reputation that cannot easily be repaired by counterspeech, however persuasive or effective," "*freedoms of expression require 'breathing space.'*"[49]

---

[47] *Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988).

[48] *Id.*, 485 U.S. at 50.

[49] *Id.*, 485 U.S. at 52, citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772, 106 S.Ct. 1558, 1561, 89 L.Ed.2d 783 (1986) (quoting *Sullivan*, 376 U.S. at 272).

(Emphasis added.) The Court acknowledged that its decision meant "outrageous" things could be said by those whose motives were "less than admirable," but concluded that a speaker or writer is protected by the First Amendment even when he is "motivated by hatred or ill will."[50] Under this standard, even if Mr. Wood was the victim of an outrageous attack, it is clear that First Amendment interests of freedom of speech and press are entitled to greater protection even if only to give sufficient breathing room to the debate. The courts below, which had in evidence the audio recording and written transcript of the show, correctly found that Del Giorno acted without malice when expressing his opinions about Mr. Wood.

D. Petitioner was not the victim of procedural errors below.

Although Petitioner does not include in his questions presented for review the subject of perceived procedural errors, he raises the issue, which he also raised in the courts below, in the text of his petition.[51] The gist of Mr. Wood's argument is that he lost a procedural advantage by having the motions for summary judgment, his motion and defendants' motion, heard at the same time.

---

[50] *Id.*, 485 U.S. at 53.

[51] Petition, pp. 8-10.

1. Discovery was complete.

Mr. Wood suggests that summary judgment was not appropriate because discovery was incomplete. The trial court and the appeals court correctly found that Mr. Wood failed to show that further discovery would have produced any new evidence creating an issue of fact. He failed to avail himself of the procedural safeguards for postponing premature motions based on the need for additional discovery,[52] and he did not inform the court of the specific discovery he needed to respond to defendants' motion. Instead of specifically setting forth his needs, plaintiff simply complained that defendants had objected to some of his interrogatories and had ignored his request that André Trevigne (a non-party to the suit) answer certain interrogatories. He also complained that the answers were defective because they were signed by counsel rather than the persons providing the information. His failure to avail himself of the appropriate procedural safeguards constitutes a waiver of the right to complain about the rendition of summary judgment based on incomplete discovery.[53] Moreover, Mr. Wood had ample time -- more than three years –

---

[52] La. Code Civ. P. art. 967(D).

[53] *Armstead v. Schwegmann Giant Supermarkets, Inc.*, 618 So.2d 1140 (La.App. 4th Cir. 1993), *writ denied*, 629 So.2d 347 (La. 1993), and *Spellman v. Peoples Bank and Trust Co. of St. Bernard*, 544 So.2d 10 (La.App. 4th Cir. 1989), *writ denied*, 548 So.2d 327 (La. 1989).

to compel discovery, but never did.[54] *Above all*, neither the trial court nor the court of appeal relied on any interrogatory answers in ruling on the cross motions for summary judgment. In this case, there was in evidence a transcript as well as an audio recording of the radio talk show that gave rise to this lawsuit. Thus, the courts below had all of the relevant facts at their disposal – that is the written words as well as the actual context in which those words were spoken, including inflection and tone of voice – when reviewing the evidence and deciding whether summary judgment was appropriate.

2. Petitioner lost no "procedural advantage" by having the cross-motions heard at the same time.

Mr. Wood contends that he was prejudiced by having his motion heard at the same time as defendants' motion. The trial court properly exercised its discretion to hear the motions together to promote judicial economy and efficiency. Despite petitioner's insistence that, had his motion been heard first, he would have won on the issue of defamation *per se*, which he claims inevitably would have led to the

---

[54] *Armstead*, 618 So.2d 1140 (plaintiff had ample opportunity to conduct discovery when summary-judgment motion filed one year after petition). In this case, the petition was filed on October 23, 1998 and plaintiff filed his summary-judgment motion on December 2, 2004; thus, he had more than six years to conduct discovery in this case.

imposition of damages, there is no reason to believe that the outcome would have been any different if the judge had held two separate hearings. Plaintiff would not have avoided having to address the First Amendment issues raised by defendants in opposition to plaintiff's motion. As the Court is well aware, great deference is accorded to a trial court's discretion to control its docket and its ruling should not be disturbed absent an abuse of discretion. No such abuse is present here.

3. Petitioner's due process rights were satisfied.

Mr. Wood contends that he was not afforded a proper hearing. Specifically, he complains that the judge did not allow sufficient time for oral argument and that the judge did not hear *any* argument on defendants' motion for summary judgment, which, Mr. Wood says, prevented him from responding to defendants' arguments. Of course, there is no right to orally argue a motion for summary judgment. Likewise, litigants have no right to talk as long as they want. Mr. Wood's due process rights to be "heard" were satisfied by filing an extensive opposition brief with the court. This argument has no merit.

CONCLUSION

This Court should decline to exercise its discretionary jurisdiction because none of the considerations governing review on certiorari are present in this state law defamation case. The Court should deny the petition for writ of certiorari.

Respectfully submitted,

DEBORAH E. LAMB
Counsel of Record
for Respondent
TAYLOR, PORTER, BROOKS
& PHILLIPS L.L.P.
P.O. Box 2471
Baton Rouge, LA 70821-2471
Telephone: (225) 387-3221